{SHOW }  PROCEEDINGS AND ORDERS  DATE: 111984

CASE NBR 83-1-02053 ATX
SHORT TITLE Allain, William A., et al.  DOCKETED: Jun 14 1984
VERSUS Brooks, Owen H., et al.

| Date | Proceedings and Orders |
|---|---|
| Jun 14 1984 | Statement as to jurisdiction filed. |
| Jul 12 1984 | Order extending time to file response to jurisdictional statement until August 17, 1984. |
| Jul 19 1984 | Record filed. |
| Aug 16 1984 | Motion of appellees Owen H. Brooks, et al. to dismiss or affirm filed. |
| Aug 20 1984 | Brief of appellee MS Republican Executive Comm. in support of petition filed. |
| Aug 22 1984 | DISTRIBUTED. September 24, 1984 |
| Sep 18 1984 | Supplemental brief of appellants William A. Allain, et al. filed. |
| Oct 1 1984 | REDISTRIBUTED. October 5, 1984 |
| Oct 9 1984 | REDISTRIBUTED. October 12, 1984 |
| Oct 18 1984 | REDISTRIBUTED. October 26, 1984 |
| Oct 29 1984 | REDISTRIBUTED. November 2, 1984 |

CONTINUE {

PROCEEDINGS AND ORDERS  DATE: 111984

CASE NBR 83-1-02053 ATX
SHORT TITLE Allain, William A., et al.  DOCKETED: Jun 14 1984
VERSUS Brooks, Owen H., et al.

| Date | Proceedings and Orders |
|---|---|
| Nov 5 1984 | REDISTRIBUTED. November 9, 1984 |
| Nov 13 1984 | Judgment AFFIRMED. Concurring opinion by Justice Stevens. Dissenting opinion by Justice Rehnquist with whom The Chief Justice joins. (Detached opinion.) |

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Supreme Court, U.S.
FILED
JUN 14 1984
ALEXANDER L. STEVAS
CLERK

83-2053

No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM A. ALLAIN, *et al.*,

*Appellants,*

v.

OWEN H. BROOKS, *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The Northern District Of Mississippi**

## JURISDICTIONAL STATEMENT

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54 pp

## QUESTIONS PRESENTED

I. Whether Section 2 of the Voting Rights Act, in which Congress sought to codify *White* v. *Regester*, requires proof of discriminatory intent.

II. Whether a finding of validity under Section 5 of the Voting Rights Act precludes a challenge under Section 2 insofar as Section 5 presents a more stringent standard and Section 2 creates no right not protected by Section 5.

III. Whether the district court clearly erred in making findings of fact which are unsupported by the record and insufficient under Rule 52(a).

## PARTIES TO THE PROCEEDING BELOW

The Appellants, defendants in the action below are:

Bill Allain, Governor of Mississippi, replacing former Governor William Winter pursuant to this Court's Rule 40.3; Edwin Lloyd Pittman, Attorney General, replacing Bill Allain in that capacity; Dick Molpus, Secretary of State, replacing Edwin Lloyd Pittman in that capacity; the State Board of Election Commissioners; Mississippi Republican Executive Committee; Mississippi Democratic Executive Committee. The following Defendants were dismissed by order of the District Court on May 7, 1982: Brad Dye, Lieutenant Governor; Clarence B. "Buddie" Newman, Speaker of the House of Representatives; T. H. Campbell III, Chairman, Bill Harpole, Vice-Chairman, and J. C. "Con" Maloney, Secretary, of the Joint Congressional Redistricting Committee.

Plaintiffs in the consolidated actions below, Appellees herein, are: Owen H. Brooks, Reverend Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Reverend Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated; and David Jordan and Sammie Chestnut, on behalf of the Greenwood Voters League, individually and on behalf of all others similarly situated.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. ___

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WILLIAM A. ALLAIN, *et al.*,

*Appellants*,

v.

OWEN H. BROOKS, *et al.*,

*Appellees*.

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**On Appeal From The United States District Court For The Northern District Of Mississippi**

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinion of the three-judge District Court for the Northern District of Mississippi entered April 16, 1984, is unreported and is reproduced in Appendix A. The prior District Court opinion is reported at 541 F.Supp. 1135 (N.D. Miss. 1982) and was vacated and remanded by this Court for reconsideration in light of Section 2 of the Voting Rights Act, as amended in 1982, *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983).

### JURISDICTION

This action was originally filed in 1982 by plaintiffs seeking to enjoin the use of two Congressional redistricting plans. On remand by order of this Court, the district court reconsidered its remedial plan in light of Section 2 of

the Voting Rights Act. The district court entered judgment on January 6, 1984 and issued an opinion on April 16, 1984. The plaintiffs, Owen H. Brooks, *et al.* filed a Jurisdictional Statement received by the cross-appelants herein on May 16, 1984. This cross appeal is docketed pursuant to Rule 12.4 by filing of this Jurisdictional Statement within 30 days of that of the appellants. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, 1973c are set out in Appendix C.

## STATEMENT OF THE CASE

In 1981 the Mississippi Legislature passed a Congressional redistricting plan, S.B. 2001. That plan was identical, with slight adjustments to accommodate minor population shifts, to the plan adopted and precleared under Section 5 of the Voting Rights Act in 1972. The 1972 plan in turn reenacted the configuration of the 1965 plan which had been declared constitutional by a district court and which judgment was affirmed by the United States Supreme Court. *Connor* v. *Johnson*, 386 U.S. 483 (1967). Nonetheless, in 1982, the Attorney General determined that he was bound by neither the prior preclearance nor the judgment of constitutionality, and he interposed an objection to S.B. 2001.

The plaintiffs below filed suit to enjoin the use of either the unprecleared plan or the malapportioned 1972 plan. The district court declined to order the interim use of S.B. 2001 without preclearance and instead instituted the so-called Simpson plan which it found, among the available



plans, to best embody state policy while meeting the requirements of the Constitution and the Voting Rights Act. *Jordan* v. *Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982).

On remand from this Court, the district court evaluated its own remedial plan in light of Section 2. It concluded that the Simpson plan, particularly District 2, was in violation of the amended statute. The court based this conclusion on an erroneous interpretation of Section 2 as a pure "results" test and the assumption that Section 2 guarantees black citizens the right to elect members of their own race and concomitantly to districts designed to achieve that purpose.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

### I. Insofar As Congress Amended Section 2 In Order To Codify *White* v. *Regester*, A Violation Of Section 2 Requires Proof Of Discriminatory Purpose.

Section 2 of the Voting Rights Act as amended provides that no electoral system or mechanism shall be imposed or applied in a manner which results in a denial or abridgement of the right to vote on account of race or color. 42 U.S.C. § 1973. The Section further provides that such a denial or abridgement is established if it is proven that "based on the totality of circumstances . . . the political processes leading to nomination or election . . . are not equally open to participation" by protected minorities. The statute adds that this depends on whether the minority in question has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

In *White* v. *Regester*, 412 U.S. 755 (1973) this Court wrote that in a vote dilution case brought under the Fourteenth Amendment:

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. 412 U.S. at 766.

The similarity between the language of the amended statute and *White* is far from coincidental. The Report of the Senate Committee on the Judiciary specifically states that the language ultimately agreed on and enacted "embodies the test laid down by the Supreme Court in *White*." Report of the Committee on the Judiciary, United States Senate, S.Rep. No. 417, 97th Cong., 2d Sess. (1982) at 27. In fact, the legislative history is replete with comments made before the committees and on the Senate floor to the effect that the new provision codified *White*. *See, e.g.*, Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) at 88 (testimony of Rep. Sensenbrenner); 199 (testimony of Sen. Mathias); 796 (testimony of Sen. DiConcini); Appendix at 80 (comments of Sen. Dole).

In *White*, the Court upheld the decision of the district court that two at-large legislative districts in Texas were "being used invidiously to cancel out or minimize the voting strength of racial groups." 412 U.S. at 765. To arrive at this conclusion the district court reviewed, and the Supreme Court later recounted, the totality of circumstances in the districts in question. The Court concluded that the challenged multi-member districts "as



designed and operated . . . invidiously excluded Mexican Americans [and Blacks] from effective participation in political life." 412 U.S. at 769.

While the Court in *White* did not expressly state that discriminatory intent was a necessary element of a vote dilution case, it is clear that the Court inferred discriminatory purpose from the totality of relevant facts. This is confirmed by Justice White, the author of the *White* v. *Regester* opinion, in his dissenting opinion in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). Justice White disagreed with the plurality in *Bolden* that the evidence in that case fell far short of establishing an impermissible intent. The *Bolden* plurality, he wrote, "ignores the principles that an invidious discriminatory purpose can be inferred from objective factors of the kind relied on in *White* v. *Regester* . . ." 446 U.S. at 95.

There are other compelling reasons to read *White* as an intent standard, albeit one that accepts circumstantial evidence of discriminatory intent. In *Washington* v. *Davis*, 426 U.S. 229 (1976) the Court unequivocally restated the proposition that discriminatory purpose is a prerequisite to a finding of a violation of the Equal Protection Clause of the Fourteenth Amendment.[1] In that opinion, the Court lists those cases which it viewed as inconsistent with the holding in *Washington*, and thereby

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[1] Interestingly, *Washington* cites *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), a case in which blacks challenged the reapportionment of the New York Legislature, as a clear precedent for the requirement of proof of intent in discrimination cases brought pursuant to the Fourteenth Amendment. This directly contradicts the erroneous view of some members of Congress that *City of Mobile* was the first case involving voting rights in which the Supreme Court required a showing of intent.

overruled. 426 U.S. at 244-45 and n.12. *White* v. *Regester* is not among the cases invalidated by the later ruling.

Finally, this Court's opinion in *Rogers* v. *Lodge*, 458 U.S. 613 (1982) demonstrates that the *White* Court inferred intent from the objective factors discussed by the trial judge. The *Rogers* Court, quoting *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), wrote that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination" by diluting the voting strength of a racial minority. The Court also cited *White* v. *Regester* in support of this basic principle, obviously reading *White* as an intent case.

Some members of Congress, however, refused to admit that the standard used in *White* was one of intent inferred from circumstantial evidence and insisted that it was a "results" test. *See*, e.g., Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Report on the Voting Rights Act, Comm. Print, 97th Cong., 2d Sess. (1982) at 194 (remarks of Sen. Dole). Rep. Hyde, noting the disparity between the views of some proponents of the bill and his own understanding of *White* commented:

> Under the Senate amendments, the "results" test remains in the statute but, since it has no precursor in the law, it is explained by the adoption of clarifying language. Specifically, the amendments provide that a violation of the results test can be shown by an examination of the totality of the circumstances surrounding the alleged discrimination, and the determination that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of the class of citizens protected" by the Voting Rights Act. While this language may give the appearance to some of being an "effects" test, and indeed has been marketed as such in some quarters,



it has been taken, virtually word for word, from the Supreme Court's 1973 holding in *White* v. *Regester*, 412 U.S. 755, 766, a case which, according to its author, Justice Byron White, underscored the requirement that an "invidious discriminatory purpose (must) be inferred from the totality of facts" to constitute a violation. *Mobile* v. *Bolden*, 466 U.S. 55, 95 (1980).

It is also worth noting that the language adopted in the Senate was suggested during the House debate by the minority but was rejected and, during negotiations for a compromise in which I was intimately involved, no one would consider it. Therefore, it is clear, and I suspect will be clear by a reviewing court, that the language adopted through the Senate compromise is language which was rejected in the House and which, therefore, represents the intent standard articulated by *White*, not an effect standard as some would suggest. 128 Cong. Rec. H3842 (daily ed. June 23, 1982) (comments of Rep. Hyde.)

In addition, Senator Orrin Hatch, Chairman of the Senate Subcommittee stated:

> To the extent that they have explicitly anchored this language to *White*—and that point is far clearer in the Committee debates on this issue than even in the Committee Report—courts are obliged to recognize this and appreciate that Congres (for better or worse) chose to incorporate the case law of *White*—all of its case law—in rendering meaning to the new statutory language. Given the Committee's decision to define the new test in terms of *White* the Committee report ironically is reduced substantially in importance. S.Rep. No. 417, 97th Cong., 2d Sess. (1982) at 104, n.24.

By virtue of Congress' expressed intent to codify the standard applied by the Supreme Court in *White*, Section 2 of the Voting Rights Act requires that a plaintiff prove

discriminatory intent. In the present case, the challenged redistricting plan had been ordered into effect as an interim plan by a three-judge federal court. The plaintiffs did not allege, nor did they attempt to prove, any discriminatory intent on the part of the court. Neither did the court below make any findings on the issue of purpose.

Numerous other federal courts have found violations of Section 2 in cases in which there was no proof of discriminatory intent. *See, e.g., Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Gingles* v. *Edmisten*, No. 81-803-CIV-5 (E.D.N.C. Jan. 27, 1984); *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1019 (5th Cir. 1984); It is essential that this Court properly interpret Section 2 in light of *White* v. *Regester* and the case law which it engendered.

**II. A Finding Of Validity Under Section 5 Precludes A Challenge Under Section 2 Insofar As Section 5 Presents A More Stringent Standard And Section 2 Creates No Right Not Protected By Section 5**

In its opinion of June 8, 1982, the district court specifically found that the Simpson plan met the requirements of Section 5.[2] *Jordan* v. *Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982) at 1143. Although it did not have authority to "preclear" the interim plan, the court recognized that it was still obligated to design a plan which was both constitutionally and statutorily valid. 541 F.Supp. 1143. *See also* App. at 5a.

The legislative history of Section 2 demonstrates that a finding of validity under Section 5 satisfies Section 2. In the Senate Report, the Committee had set out to refute

[2] In the appeal of this decision which resulted in remand, the Department of Justice also found the Court's plans to fully satisfy Section 5. *See Brooks* v. *Winter*, No. 82-233, Brief for the United States as Amicus Curiae at 11-12.



the findings of the Subcommittee which had identified many cities including Savannah, Georgia, as vulnerable under the new standard. The Senate Judiciary Committee, determined that this finding of the Subcommittee was obviously inaccurate. Savannah had completed an annexation in 1978 which had required preclearance. "After subjecting the proposed annexation to the rigorous requirements of Section 5," the Department of Justice decided that the election system provided black voters with adequate opportunity for participation and election. S.Rep. No. 97-417 at 35. The Senate Report concluded that insofar as Savannah's city council system had passed muster under Section 5, it would necessarily also meet the requirements of the proposed amendment. *Id.* at 35. Because Section 2 as amended establishes a standard no more stringent than Section 5, the court below was precluded from considering a challenge to the Simpson plan under Section 2.

In its original opinion before remand, the district court noted that neither the Constitution nor the Voting Rights Act required a state "to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." 541 F.Supp. at 1144, quoting *Mississippi* v. *United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd mem.* 444 U.S. 1050 (1980). These comments from the court in 1982 referred to Section 5, but they are just as true today under Section 2 as amended. Section 2 creates no new substantive rights. *See Smith* v. *Winter*, 717 F.2d 191 (5th Cir. 1983) at 198, n.3. Thus the rights the court below must protect under Section 2 were already adjudicated in the prior litigation when the court designed an interim plan which satisfied Section 5.

Nevertheless, the court below replaced the Simpson plan which contained a Second District with a slight white voting age majority in spite of a black population majority, with a new plan containing a black voting age population of 52.9 percent. The court did this in order to ensure that, if the blacks in the district vote as a bloc, a black candidate would be elected. Section 2, however, does not guarantee any group the right to elect one of its own members. *Seamon* v. *Upham*, No. P-81-49 C.A. (E.D. Tex. Jan 30, 1984) The district court correctly assumed that there is a right to unhindered access to the ballot as well as a right to form political associations and launch candidates. It wrongly assumed, however, that Section 2 somehow confers a right, not granted in Section 5, to be represented as a group or by a member of one's own race.

The importance of this issue, the interrelationship between Section 5 and Section 2, cannot be overstated. It has been raised before several district courts, *see e.g.*, *Major* v. *Treen*, 574 F.Supp. 325 (E.D. La. 1983), and in Jurisdictional Statements presently pending before the Court. *See Mississippi Republican Executive Committee* v. *Brooks*, No. 82-1722; *Edmisten* v. *Gingles*, No. 83-1968. The resolution of this question would avoid needless relitigation of vote dilution cases in covered jurisdictions.

### III. The District Court Clearly Erred In Making Findings Of Fact Which Are Unsupported By The Record And Insufficient Under Rule 52(a)

The plaintiffs in the action below presented evidence designed to establish the existence of the factors listed as relevant to a finding of dilution in the Senate Report. S.Rep. at 28-9. The Court in turn made findings of fact suggested by the Senate factors, but failed to account for any of the contradictory evidence or to show how the record supported those findings.



The court found that blacks in Mississippi and especially in the Delta "generally have less education, lower incomes, and more menial occupations than whites." App. at 10a. Based on the comment in the Senate Report that evidence of socio-economic disparities between blacks and whites is probative of unequal access to the political process,[3] the court found that political participation by blacks in the Delta region and in the State as a whole, was depressed.

This finding was directly refuted by actual statistics on political participation published by the United States Bureau of the Census. The Census Bureau publication, "Voting and Registration in the Election of November 1982," which was received into evidence, (P.Ex. 45) showed that 79.6% of the whites and 75.8% of the blacks were registered statewide. Tr. 55. In addition, 52.4% of the eligible whites actually voted in the November 1982 election as compared to 50.8% of the eligible blacks. Tr. 55. The difference between registration and turnout for the two racial groups is *de minimus;* surely based on the

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[3] "The courts have recognized that disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participations, *e.g.*, *White*, 412 U.S. at 768; *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 145. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further casual nexus between their disparate socio-economic status and the depressed level of political participation." Senate Report No. 417, 97th Congress 2nd Sess. at 29, n.114.

In note 114 of the Senate Report, Congress expressed its intent that a plaintiff need not prove a casual nexus between disparate socio-economic status and depressed political activity. However, social and economic circumstances have no relevancy at all to the issue of vote dilution if participation by the group claiming dilution is not in fact depressed. Note 114 does not relieve the plaintiffs of proving depressed political participation, it merely relieves them of proving the nexus between the two circumstances.

available statistics, the political participation of blacks cannot be said to be depressed. The high level of political activity by blacks in the state is even more striking when Mississippi's black registration rate of 75.8% is compared with the national figure of 59.1%. In fact, the State of Mississippi has the third highest rate of registration among blacks in the country. The district court erred in *guessing* at the level of participation among blacks based on socio-economic factors, when direct evidence of political involvement was available. Moreover, the Court failed to state all the substantial evidence contrary to its opinion, such as the Census Bureau registration and turnout figures, as required by Federal Rule of Civil Procedure 52(a). *See Velasquez* v. *City of Abilene*, 725 F.2d at 1020-23.

The court also made findings regarding polarized voting which cannot be sustained based on the evidence. The court found, based on the testimony of plaintiffs' expert, that in Mississippi "the majority of voters choose their preferred candidates on the basis of race." App. at 10a. However, the plaintiffs' expert witness merely demonstrated that the racial make-up of a precinct correlated with the race of the candidate who carried that precinct. He did not attempt to test any factors but race for similar correlations. As Judge Patrick E. Higginbotham of the Fifth Circuit noted recently, a truly objective analysis would test for other explanatory factors such as campaign expenditure, party identification, media use, religion, name identification and the distance the candidate lived from any particular precinct. *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984), *reh'g and reh'g en banc denied*, 730 F.2d 233 (5th Cir. 1980). The use of a regression analysis which correlates only racial make-up of the precinct with race of the candidate "ignores the reality that race . . . may mask a host of other explanatory



variables." *Id.* at 235. *Cf. Terrazas* v. *Clements*, 581 F.Supp. 1329, 1351-5 (N.D. Tex. 1984) (detailed discussion of proof regarding polarized voting).

In addition, the court failed to state the significant evidence which contradicted its finding of racial polarization. For example, the analyses performed by the defendants' expert showed a consistent and substantial Republican vote in the Second District which would account for the paucity of votes in some areas for a black Democratic candidate. Tr. at 393. The court also failed to note that State Representative Robert Clark, the black democratic nominee in the 1982 race for the Second District, lost by less than 3,000 votes and received, according to the plaintiffs' expert, 19% of the white vote. Tr. at 276. Further, the court did not mention that there was substantial evidence that many black leaders opted not to support Clark because they feared that a victory for Clark in that 53% black district would "lose the argument we've made all these years that we need a 65% black population . . . to have a realistic chance of winning." Tr. at 175.

Based as it is on insufficient findings of fact, the judgment of the court below should not stand.

## CONCLUSION

For the reasons stated above, the Court should note probable jurisdiction of this cross-appeal.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

**District Court Opinion.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

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No. GC82-80-WK-0

DAVID JORDAN, *et al.*,
*Plaintiffs,*

v.

WILLIAM WINTER, *et al.*,
*Defendants.*

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No. GC82-81-WK-0

OWEN H. BROOKS, *et al.*,
*Plaintiffs,*

v.

WILLIAM F. WINTER, *et al.*,
*Defendants.*

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(April 16, 1984)

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ON REMAND FROM THE
UNITED STATES SUPREME COURT

Before CLARK, Chief Circuit Judge; SENTER, Chief District Judge; and KEADY, Senior District Judge.

PER CURIAM:

On June 8, 1982, this court ordered into effect on an interim basis a congressional redistricting plan for the State of Mississippi. *Jordan v. Winter*, 541 F.Supp. 1135, 1144-45 (N.D. Miss. 1982). On appeal, the United States Supreme Court vacated this court's judgment and remanded the case for further consideration in light of Section 2 of the Voting Rights Act of 1965, —— U.S. ——, 103 S.Ct. 2007 (1983).

This court held an evidentiary hearing in December of 1983. On the basis of the evidence adduced at trial and the pleadings, briefs, and argument of counsel, we concluded that the court-ordered plan, or Simpson Plan, violated amended § 2. The court found that the structure of the Second Congressional District in particular unlawfully diluted black voting strength. Accordingly, on January 6, 1984, we entered judgment directing the use, until the Mississippi Legislature enacts a valid congressional redistricting plan, of an interim plan fashioned by the court with the aid of the parties. Pursuant to the reservation set out in that final judgment, we now enter Findings of Fact and Conclusions of Law in support of that judgment, in conformity with Fed. R. Civ. P. 52(a).

I. *Procedural History*

The history of the legislative and judicial efforts to secure a constitutional congressional redistricting plan for the State of Mississippi is set out in our prior decision in *Jordan v. Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982). Only a brief summary is required here.

The 1980 official census revealed a total population disparity in Mississippi's 1972 congressional districting plan of 17.6%. Recognizing the constitutional problem posed by such malapportionment, *see* U.S. Const. Art. 1, § 2; *Reynolds v. Sims*, 377 U.S. 533 (1964), the Mississippi Legislature in 1981 enacted S.B. 2001 [1] for redistricting

[1] 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8.



the state's five congressional districts. The Attorney General of the United States, after reviewing the plan pursuant to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c,[2] interposed a timely objection on March 30, 1982. The Attorney General found the plan defective because it divided the concentration of black majority counties located in the northwest or "Delta" portion of the state among three districts rather than concentrating them in a single district.[3] He concluded that this configuration constituted an unlawful dilution of minority voting strength.

The Mississippi Legislature did not attempt to enact another plan or otherwise to obtain preclearance from the Attorney General. On April 7, 1982, it filed a declaratory judgment action in the United States District Court for the District of Columbia seeking judicial preclearance of S.B. 2001. *Mississippi v. Smith*, No. 82-0956. That action has since been voluntarily dismissed.

The Jordan and Brooks plaintiffs then filed class actions to enjoin enforcement of S.B. 2001 until it was precleared, to prohibit further use of the 1972 plan because of population malapportionment, and to secure a court-ordered interim plan for the 1982 congressional elections and thereafter until change by law. A three-judge district court was convened pursuant to 28 U.S.C. § 2284.

[2] Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S.B. 2001 was a change in voting standards, practices, or procedures within the meaning of § 5.

[3] The Mississippi Delta consists of the following counties: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Zazoo. Mississippi's congressional districting plans from 1882 to 1966 all contained a district encompassing most of the Delta counties. 541 F. Supp. at 1139 and n.2. Maps depicting the congressional districts as they existed under the 1962 plan and under S.B. 2001 are attached. District 2 of the 1962 plan contains most of the Mississippi Delta.

Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973j(f). This court declined to place the unprecleared S.B. 2001 into effect on an interim basis and concluded that the 1972 plan was unconstitutionally malapportioned and therefore also unsuitable for interim use. *Jordan v. Winter*, 541 F.Supp. at 1142. It thus limited its consideration to two plans advocated by the plaintiffs and one advocated by the AFL-CIO as amicus curiae.

Plaintiffs urged the court to order into effect either of two plans devised by Senator Henry J. Kirksey, a black state legislator. Both plans kept the Delta area intact and achieved black majority districts by combining the Delta area with predominantly black portions of Hinds County and the City of Jackson. 541 F.Supp. at 1140. Plaintiffs' preferred plan (Kirksey Plan 1) contained one district that was 64.37% black; the alternative plan (Kirksey Plan 2) contained one district that was 65.81% black. *Id.* The plan urged by the AFL-CIO, the "Simpson Plan," combined fifteen Delta and part-Delta counties with six predominantly white eastern rural counties to produce four majority white districts and one district with a black population majority of 53.77%. *Id.* at 1141. The Kirksey Plan 1 had a total population variance of .2150%; the Kirksey Plan 2 a variance of .230%, and the Simpson plan a variance of .2141%.

The court was bound by *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982), to fashion an interim plan that adhered to the state's political policies to the extent those policies did not violate the Constitution or the Voting Rights Act. 541 F.Supp. at 1141. The court determined that the following political policies underlay the passage of S.B. 2001:

> (1) Minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population.



*Id.* at 1143. Because the Simpson Plan most nearly accorded with the latter three policies, which the court found to be constitutionally and statutorily valid,[4] we ordered it into effect on an interim basis. That plan was used for the 1982 congressional elections. It is depicted on a map appended to our prior decision, *id.* at 1146, and is statistically described as follows:

| District | Total Population | Deviation | % Deviation | Black % |
|---|---|---|---|---|
| 1 | 504,671 | +543 | +.1077 | 25.86 |
| 2 | 504,697 | +569 | +.1128 | 53.77 |
| 3 | 503,760 | −368 | −.0729 | 31.23 |
| 4 | 503,893 | −235 | −.0466 | 45.25 |
| 5 | 503,617 | −511 | −.1013 | 19.84 |

Although the Second District under the Simpson Plan was a majority black district (53.77%), it had a minority black voting age population of 48.05%.

Analysis of the Simpson Plan under the standard established in amended § 2 of the Voting Rights Act of 1965 reveals its invalidity.

## II. *Amended Section 2*

Section 2 of the Voting Rights Act of 1965, as amended, presently reads:

> Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in con-

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[4] As to the first policy, the court recognized that the validity of the Attorney General's conclusion that drawing lines for Districts 1, 2, and 3 from east to west unlawfully diluted black voting strength was the primary issue in the proceedings then pending in the District Court of the District of Columbia. It therefore accepted, without indicating any view as to its validity, the Attorney General's conclusion. 541 F.Supp. at 1143.

travention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) a violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973 (West Supp. 1983). The amendment to Section 2 was designed to eliminate the requirement, prescribed in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 2332 (1980), that a plaintiff demonstrate intentional discrimination to establish a violation of section 2.[5]

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[5] S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. . . .

S. Rep. No. 417, 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 (hereinafter cited as Senate Report). *See Jones v. City of Lubbock*, No. 83-1196 (5th Cir. Mar. 5, 1984); *Jordan v. City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1072 (6th Cir. 1983); *Campbell v. Gadsden County School Board*, 691 F.2d 978, 981, n.4 (11th Cir. 1982); *Seamon v. Upham*, CA No. P-81-49-CA (E.D. Tex. 1983); *Major v. Treen*, 574 F.Supp. 325, 342 (E.D. La. 1983); Blumstein, Defining and Proving Race Discrimination: *Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 689-70 (1983); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 726 (1982).

The Republican Defendants have argued that amended Section 2 preserves the requirement of proving discriminatory intent. We find this argument to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation.



We reject the contention of the Republican Defendants that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the fifteenth amendment. We agree with the analysis and conclusion set out in *Major v. Treen*, 574 F.Supp. 325, 342-349 (E.D. La. 1983) (three judge court), which rejected a similar assault on the constitutionality of Section 2. We therefore adopt that treatment of this issue without repetition here.

The Senate Judiciary Report on the amendment states that the "results" language of new Section 2 was meant to "restore the pre-[*City of Mobile v.*] *Bolden* legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." Senate Report at 27. The Report then enumerates the factors courts should consider in deciding whether plaintiffs have established a violation of Section 2. These factors, derived from the Supreme Court's opinion in *White v. Regester*, 412 U.S. 755 (1973), as applied in this Circuit in *Zimmer v. McKeithen*, 485 F.2d 1287 (5th Cir. 1973) (en banc), *aff'd on other grounds sub. nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), include, but are not limited to:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report at 28-29 (footnotes omitted). The Report also cites for consideration, as additional factors probative of a violation of Section 2: (1) whether elected officials are unresponsive to the needs of minority group members; and (2) whether the policy underlying the challenged procedure is "tenuous." *Id.* at 29. No particular number of these factors need be proved. *Id.*

III. *Amended Section 2 and the Simpson Plan*

The court finds that the aggregate of the following factors shows that the Simpson Plan unlawfully dilutes minority voting strength.

A. *Past Discrimination*

That Mississippi has a long history of de jure and de facto race discrimination is not contested. That history



has been often recounted in judicial decisions[6] and includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering for the vote. The State is a covered jurisdiction under the Voting Rights Act of 1965. The Attorney General has designated 42 of the counties in Mississippi for federal registrar enforcement of the right to vote.

We find that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi.[7] Blacks in Mississippi,

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[6] *See, e.g., United States v. Mississippi*, 380 U.S. 128 (1965); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144 (5th Cir. 1977); *Moore v. Leflore County Board of Election Commissioners*, 502 F.2d 621, 624 (5th Cir. 1974), *aff'g* 361 F.Supp. 603, 605 (N.D. Miss. 1972); *Mississippi v. United States*, 490 F.Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[7] The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participations, e.g. *White* [*v. Regester*], 412 U.S. at 768; *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 [(5th Cir. 1977)]. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Senate Report No. 417, 97th Congress 2d Sess. at 29, n.114.

especially in its Delta region, generally have less education, lower incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. *See* United States Commission on Civil Rights, *Voting in Mississippi*, pp. 3-4 (1965). Census statistics indicate lingering effects of this past discrimination: the median family income in the Delta Region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing.

B. *Racial Bloc Voting*

Plaintiffs have established that voters in Mississippi have previously voted and continue to vote on the basis of the race of candidates for elective office. The state defendants had conceded as much prior to the 1982 elections, but attempted to show at trial that the 1982 campaign in the Second District was not characterized by racial bloc voting. The evidence defendants presented was that the black Democratic candidate, Robert Clark, received approximately 15% of the white vote in the 1982 general election and that Clark won the Democratic nomination in a primary contest against white opponents. The primary election in the Second District conducted under our prior plan was characterized by confusion and low voter turnout due to a variety of factors, including uncertainty about election dates, the recent realignment of the district, and the lack of an incumbent. The race was additionally atypical because of a court order allowing Republican voters to participate in the Democratic primary. Clark's victory in the primary was followed by defeat in the general election—a defeat we find was caused in part by racial bloc voting. Plaintiffs' proof,



also based on analysis of these election returns, demonstrated a consistently high degree of racially polarized voting in the 1982 election and previous elections. From all of the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population. Since the Second District under the Simpson Plan does not have a majority black voting age population, the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice. As the Supreme Court held in *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3279 (1982):

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.

C. *The State Policies Underlying the Simpson Plan*

This court previously adopted the Simpson Plan for interim use primarily because it conformed to the State legislature's policy of favoring the division of the black population of the State into two "high impact" districts rather than concentrating it into one district. 541 F. Supp. at 1143-44. The results test required by Section 2 precludes dependence on this policy. The combination of six predominantly white eastern counties with the Delta region's black population, when considered in light of the effects of past discrimination on black efforts to participate in political affairs and the existence of racially polarized voting, operated to minimize, cancel, or dilute black voting strength in the Second District. *Kirksey v. Board of Supervisors*, 554 F.2d at 150; *see Major v. Treen*, 574 F.Supp. at 354; Hartman, *Racial Vote Dilution and Sepa-*

*ration of Powers; An Exploration of the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 695 (1982). Our previous opinion relied on *United States v. Forrest County Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), and *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). Neither involved evidence of racial bloc voting. They are no longer apposite.

D. *Other Factors*

Plaintiffs produced other persuasive evidence that the political processes in Mississippi were not equally open to blacks. Evidence of racial campaign tactics used during the 1982 election in the Second District supports the conclusion that Mississippi voters are urged to cast their ballots according to race.[8] This inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts.

IV. *The Court-Ordered Interim Plan*

In devising a plan to replace our prior plan for the impending election, we recognized the obligation to: (1) achieve the least possible deviation from the one person, one vote ideal, *Chapman v. Meier*, 420 U.S. 1, 26-27, 95 S.Ct. 751, 765-66 (1975); (2) design a plan that is not

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[8] One campaign television commercial sponsored by the white candidate whose slogan was "He's one of us" opened and closed with a view of Confederate monuments accompanied by this audio message:

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.



racially discriminatory in either purpose or effect, *McDaniel v. Sanchez*, 452 U.S. 130, 148, 101 S.Ct. 2224, 2235 (1981); and (3) adhere to the state's policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act, *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 1520-21 (1982).

The plan ordered into effect by our final judgment of January 6, 1984, meets these requirements. The statistics of that plan are set out below.

| Congressional District | Total Population | Percent Variance From the Norm | Black Population | % Black | Total Voting Age Pop. (VAP) | Black VAP | % Black VAP |
|---|---|---|---|---|---|---|---|
| 1 | 504,077 | —.0101% | 124,196 | 24.63% | 346,074 | 74,165 | 21.43% |
| 2 | 504,024 | —.0206% | 293,838 | 58.30% | 322,719 | 170,491 | 52.83% |
| 3 | 504,242 | +.0226% | 161,710 | 32.07% | 348,524 | 98,478 | 28.26% |
| 4 | 504,187 | +.0117% | 211,714 | 41.99% | 346,370 | 129,618 | 37.42% |
| 5 | 504,168 | —.0040% | 96,806 | 19.01% | 342,754 | 57,068 | 16.65% |
| | | Range .0432 | | | | | |

The interim plan was constructed under these criteria: create a rural Delta-River area district with a black voting age population majority; achieve minimal deviation from the ideal population per congressional district of 504,128; create districts containing voters with similar interests; preserve the electoral base of incumbents; and comply with the legislative goal of achieving high impact districts without splintering cohesive black populations.

We recognize that the creation of a Delta district with a majority black voting age population implicates difficult issues concerning the fair allocation of political power. *See* A. Howard & B. Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). Although the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), can come into tension with Congress' disclaimer in amended § 2 of any right to proportional representation, the plan we have adopted fully rectifies the dilution of black voting strength in the Sec-

ond District and satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi.

The court rejected alternative plans offered by plaintiffs which would achieve a significantly higher black voting age population (approximately 60%) in the Second District. Plaintiffs argue that a black voting age population of such preponderance is required for blacks to elect representatives of their choice. Amended § 2, however, does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process. In commenting upon the § 2 amendment, Senator Dole, a leading sponsor of the compromise legislation, stated: "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." Senate Report at 193. In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections. Credible expert testimony received in this case supports this conclusion. Additionally, plaintiffs' plans are an obvious racial gerrymander which would bring into the Second District overwhelmingly black sections of the City of Jackson and its suburbs; these inner-city, metropolitan areas have little in common with the interests of the predominantly rural Delta region. Also, plaintiffs' plans unnecessarily dilute black voting strength in the Fourth District. The Fourth District presently has a black population of 45.25%. The evidence presented indicates this is a factor in making the Fourth District representative reasonably receptive and sensitive to the needs of the black community. The plan adopted necessarily reduces the black population of the Fourth District to 41.99%.



To further reduce the black population in the Fourth District to 33.7 or 33.83% as proposed by plaintiffs (541 F. Supp. at 1140) would diminish the impact of black voters in that district. Although the plans proposed by plaintiffs would probably insure the election of a black congressmen in the Second District, the attempt to gain this election guaranty, which § 2(b) expressly disclaims, would have a certain adverse effect on the impact of the black voters in the Fourth District. Because of these considerations, we conclude that a black voting age population majority of 52.83% achieved under the court's plan will remedy the defect we now perceive in the Simpson Plan under the amended § 2.

We are cognizant that our court-ordered interim plan does not provide a compact geographical configuration for the Second District. However, it consists of rural Delta and river counties with similarities of interest; avoids gerrymandering a substantial portion of metropolitan Jackson into a district with these rural or farm counties; and yields the least adverse impact on the black voting influence in the Fourth District.

A specific description of the five congressional districts as established in our final judgment of January 6, 1984, and map outlining these districts, are attached.

/s/ C.C.

/s/ L.T.S.Jr.

/s/ W.C.K.

EDITOR'S NOTE

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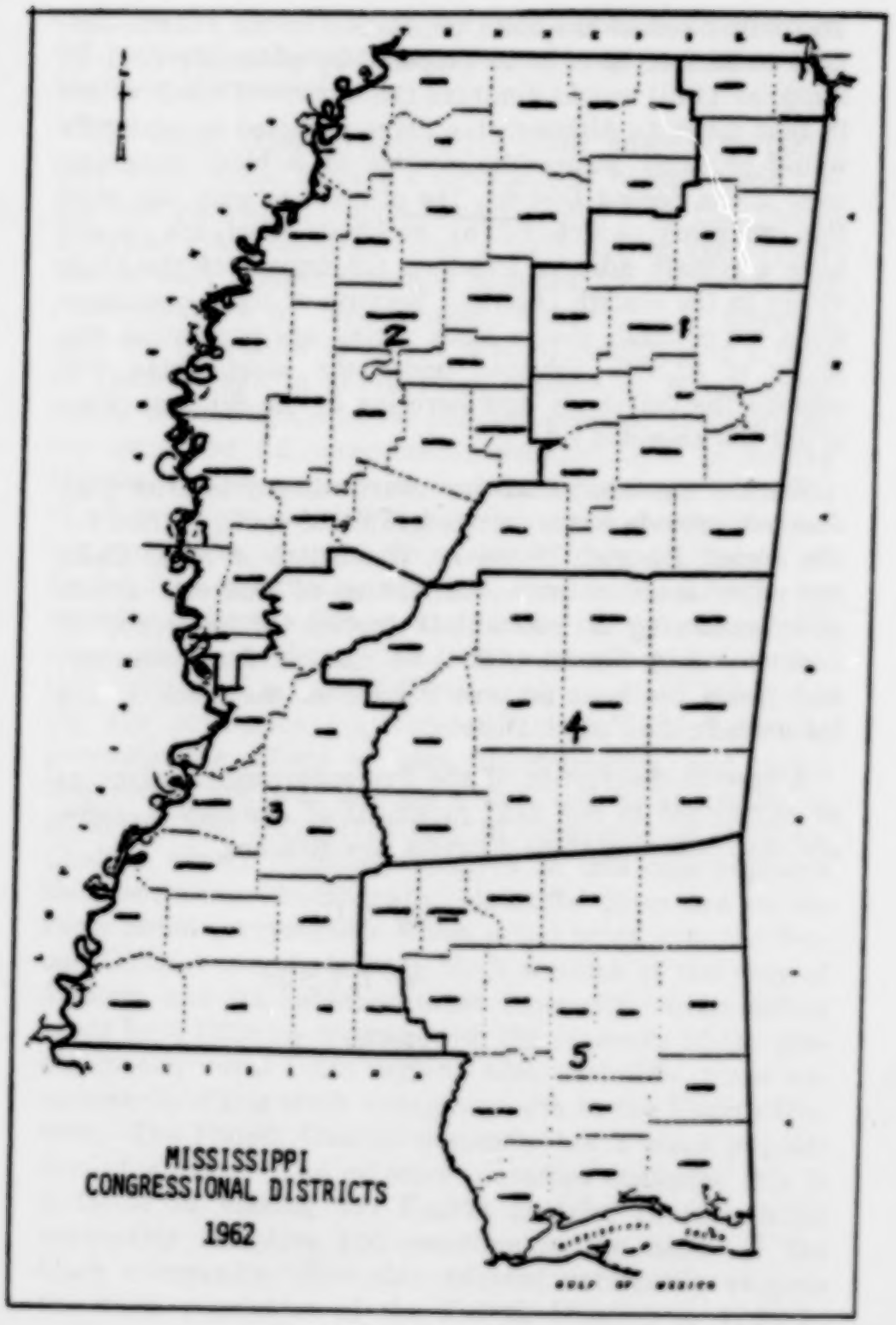
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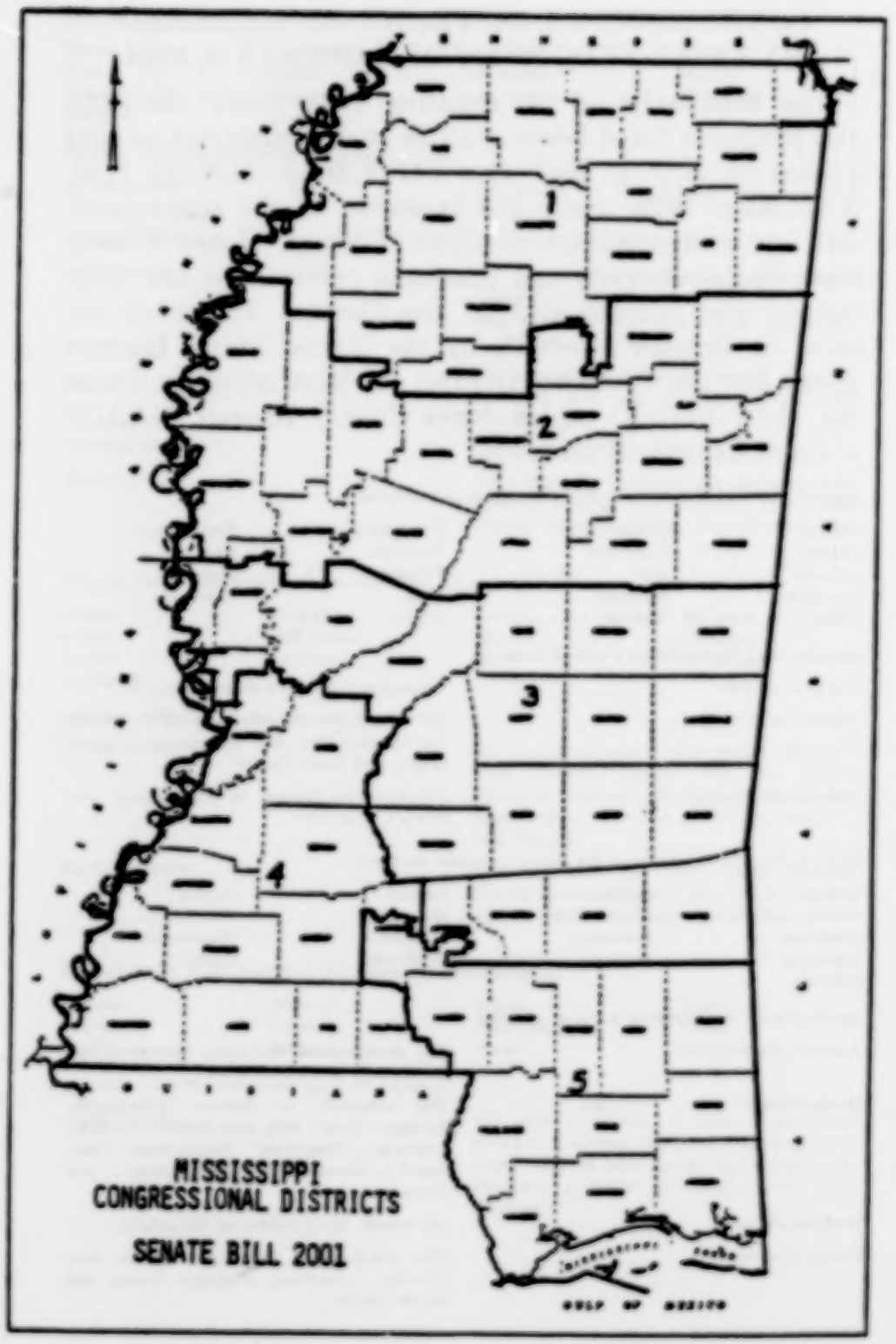
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MISSISSIPPI
CONGRESSIONAL DISTRICTS
SENATE BILL 2001

# CONGRESSIONAL DISTRICTS ESTABLISHED BY FINAL JUDGMENT OF JANUARY 6, 1984

The boundaries of all counties, supervisors' districts, and precincts listed below shall be such boundaries as they existed on July 1, 1981 (*see* 541 F.Supp. 1135 at 1145, N.D. Miss. 1982), with the exception of the supervisors' districts and precincts of Jones County. Jones County supervisors' districts and precincts referred to are those defined and incorporated in the Consent Judgment entered on October 26, 1983, by the United States District Court for the Southern District of Mississippi in Cause No. H-83-0200(R) styled Jones County Branch, NAACP v. Jones County, Mississippi.

District No. 1 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Alcorn | Itawamba | Montgomery | Tishomingo |
| Benton | Lafayette | Pontotoc | Union |
| Calhoun | Lee | Prentiss | Webster |
| Chickasaw | Marshall | Tate | Yalobusha |
| DeSoto | Monroe | Tippah | |

together with the following parts of counties:

| | |
|---|---|
| Choctaw County | All except for the Panhandle precinct; |
| Panola County | All except for the precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis; |
| Tallahatchie County | All precincts located in Supervisors' Districts 1, 2, and 3. |

District No. 2 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Bolivar | Holmes | Leflore | Tunica |
| Carroll | Humphreys | Quitman | Warren |
| Claiborne | Issaquena | Sharkey | Washington |
| Coahoma | Jefferson | Sunflower | Yazoo |
| Grenada | | | |

together with the following parts of counties

| | |
|---|---|
| Attala County | The precincts of McAdams, Newport, Sallis, Shrock, and Possumneck; |
| Hinds County | The precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas, Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2; |
| Madison County | All except the precinct of Ridgeland; |
| Panola County | The precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis; |
| Tallahatchie County | All precincts located in Supervisors' District 4 and 5. |



District No. 3 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Clarke | Lauderdale | Newton | Scott |
| Clay | Leake | Noxubee | Smith |
| Jasper | Lowndes | Oktibbeha | Winston |
| Kemper | Neshoba | | |

together with the following parts of counties:

| | |
|---|---|
| Attala County | All except for the precincts of McAdams, Newport, Sallis, Shrock, and Possumneck; |
| Choctaw County | The Panhandle precinct; |
| Jones County | All new precincts located in new Supervisors Districts Nos. 1, 2, and 3;<br>The New Blackwell precinct in new Supervisors' District No. 4; and<br>All of new Supervisors' District 3 except the new precincts of Glade, Ovett, and Tuckers; |
| Madison County | The Ridgeland precinct; |
| Rankin County | All except for the precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star. |

District No. 4 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Adams | Franklin | Lincoln | Simpson |
| Amite | Jeff. Davis | Marion | Walthall |
| Copiah | Lawrence | Pike | Wilkinson |
| Covington | | | |

together with the following parts of counties:

| | |
|---|---|
| Hinds County | All except the precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2. |
| Rankin County | The precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star. |

District No. 5 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Forrest | Hancock | Lamar | Perry |
| George | Harrison | Pearl River | Stone |
| Greene | Jackson | Perry | Wayne |

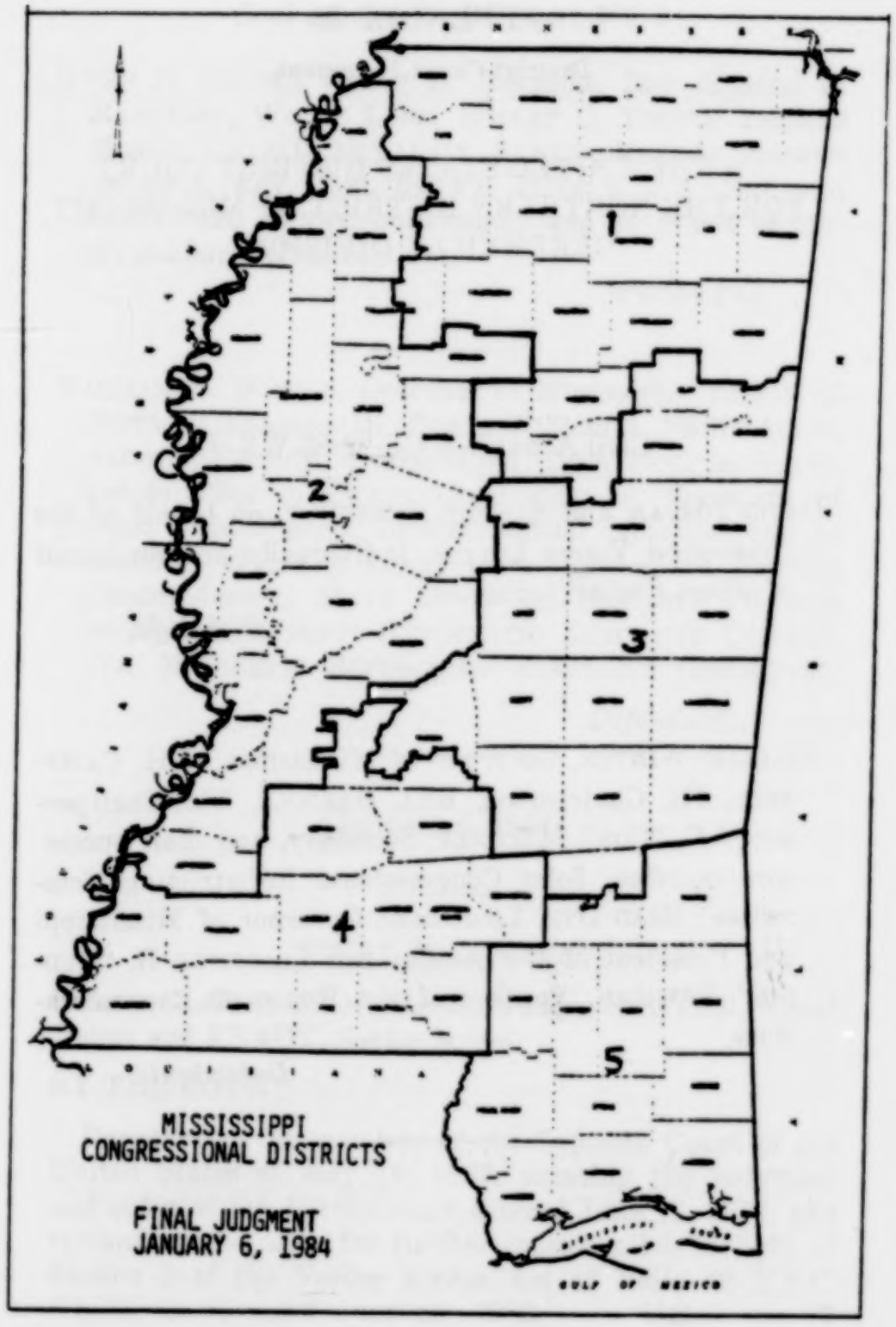
together with the following parts of counties:

| | |
|---|---|
| Jones County | All new precincts in new Supervisors' District 4 except the new Blackwell Precinct; and In new Supervisors' District 3, the new precincts of Glade, Ovett, and Tuckers. |

The statistics for each of the five congressional districts defined above are as follows:

| Congressional District | Total Population | Percent Variance from the Norm | Black Population | % Black | Total Voting Age Pop. (VAP) | Black VAP | % Black VAP |
|---|---|---|---|---|---|---|---|
| 1 | 504,077 | —.0101% | 124,136 | 24.63% | 346,074 | 74,165 | 21.43% |
| 2 | 504,024 | —.0206% | 293,838 | 58.30% | 322,719 | 170,491 | 52.83% |
| 3 | 504,242 | +.0226% | 161,710 | 32.07% | 348,524 | 98,478 | 28.26% |
| 4 | 504,187 | +.0117% | 211,714 | 41.99% | 346,370 | 129,618 | 37.42% |
| 5 | 504,108 | —.0040% | 95,808 | 19.01% | 342,754 | 57,068 | 16.65% |
| | | Range .0432 | | | | | |





## APPENDIX B

**District Court Judgment.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

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Civil Action No. GC 82-80-WK-0

DAVID JORDAN and SAMMIE CHESTNUT, on behalf of the Greenwood Voters League, Individually and on behalf of others similarly situated,

*Plaintiffs,*

v.

WILLIAM WINTER, Governor of Mississippi; T.H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J.C. "CON" MALONEY, Secretary, and their successors in office, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

*Defendants.*

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Civil Action No. GC 82-81-WK-0

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLIE MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of others similarly situated,

*Plaintiffs,*

v.

WILLIAM F. WINTER, Governor of Mississippi; EDWIN L. PITTMAN, successor in office to William A. "Bill" Allain, Attorney General of Mississippi; DICK MOLPUS, successor in office to Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners; STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

*Defendants.*

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(January 6, 1984)

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FINAL JUDGMENT

Before CLARK, Chief Circuit Judge, SENTER, Chief Judge, and KEADY, Senior Judge:

BY THE COURT:

Pursuant to the mandate of the Supreme Court of the United States of May 16, 1983, vacating the judgment and order of the district court entered June 10, 1982, and remanding the cases for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended June 29, 1982, —— U.S. ——, 77

L.Ed.2d 291 (1983) (Mem.), the district court reconvened, received additional oral and documentary evidence, and considered briefs and argument of counsel. In its bench ruling (appended hereto as Addendum "A"), the court found that the congressional redistricting plan it previously adopted violates amended Section 2, particularly as to the structure of the Second Congressional District. Therefore, the court-ordered redistricting plan previously entered must be revised.

Accordingly, it is

ORDERED:

That until a redistricting plan is duly enacted by the State of Mississippi and precleared in accordance with Section 5 of the Voting Rights Act of 1965, as amended, the five Mississippi congressional districts for the election of members of the United States House of Representatives in the primary and general elections for 1984 and thereafter are established as detailed on Addendum "B" hereto. A map depicting the foregoing court-ordered congressional redistricting plan is also appended hereto as Addendum "C".

The Court reserves the power to issue supplemental directions and orders should the need arise, to carry out the provisions of this judgment. The court also reserves the right to file an opinion at a later date.

This 6th day of January, 1984.

/s/ Charles Clark
United States Circuit Judge

/s/ L. T. Senter, Jr.
United States District Judge

/s/ William C. Keady
United States District Judge



## OPINION OF THE COURT

Announced December 21, 1983

BY JUDGE CLARK:

Ladies and Gentlemen. The court has come to a decision which must be implemented with the assistance of the parties in the case because the court does not have the expertise or the precise figures to make a final judgment. Until such time as the Legislature of the State of Mississippi discharges its duty to redistrict the Congressional Districts of the State of Mississippi in accordance with the 1980 census, the court must act under the remand of the Supreme Court of the United States to reconsider its prior decision in this case in light of the reenacted Section 2 of the Voting Rights Act.

The court finds that the plaintiffs have shown by a preponderance of the evidence that the totality of the circumstances show that the political processes in District 2 in particular are not equally open to participation by members of a class protected by Section 2(A) of the amended Act in that the members of that class have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.

In order to guide the parties in assisting the court to draw a precise decree, the court announces the following guidelines. I'll ask the clerk at this time to hand to each of the parties two lists prepared by the court which relate to District 2.

### ADDENDUM "A"

The Second Congressional District of the State of Mississippi will be comprised of the following whole counties: Bolivar, Carroll, Claiborne, Coahoma, Grenada, Holmes, Humphreys, Issaquena, Jefferson, Quitman, Sharkey, Sunflower, Tunica, Washington, Yazoo, Warren,

District No. 3 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Clarke | Lauderdale | Newton | Scott |
| Clay | Leake | Noxubee | Smith |
| Jasper | Lowndes | Oktibbeha | Winston |
| Kemper | Neshoba | | |

together with the following parts of counties:

| | |
|---|---|
| Attala County | All except for the precincts of McAdam, Newport, Sallis, Shuck, and Possumneck; |
| Choctaw County | The Panhandle precincts; |
| Jones County | All new precincts located in new Supervisors Districts Nos. 1, 2, and 3; |
| | The new Blackwell Precinct in new Supervisors' District No. 4; and |
| | All of new Supervisors' District 3 except the new precincts of Glade, Ovett, and Tuckers; |
| Madison County | The Ridgeland precinct; |
| Rankin County | All except for the precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star. |

District No. 4 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Adams | Franklin | Lincoln | Simpson |
| Amite | Jeff. Davis | Marion | Walthall |
| Copiah | Lawrence | Pike | Wilkinson |
| Covington | | | |

together with the following parts of counties:

| | |
|---|---|
| Hinds County | All except the precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas, Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2. |
| Rankin County | The precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star. |

District No. 5 shall consist of the following whole counties:

| | | | |
|---|---|---|---|
| Forrest | Hancock | Lamar | Perry |
| George | Harrison | Pearl River | Stone |
| Greene | Jackson | Perry | Wayne |

together with the following parts of counties:

| | |
|---|---|
| Jones County | All new precincts in new Supervisors' District 4 except the new Blackwell Precinct; and in new Supervisors' District 3, the new precincts of Glade, Ovett, and Tuckers. |



The statistics for each of the five congressional districts defined above are as follows:

| Congressional District | Total Population | Percent Variance from the Norm | Black Population | % Black | Total Voting Age Pop. (VAP) | Black VAP | % Black VAP |
|---|---|---|---|---|---|---|---|
| 1 | 504,077 | -.0101% | 124,136 | 21.43% | 344,074 | 74,103 | 21.43% |
| 2 | 504,824 | -.0206% | 293,[illegible]78 | 58.30% | 322,719 | 170,491 | 52.93% |
| 3 | 504,242 | +.0226% | 161,710 | 32.07% | 348,524 | 98,478 | 28.26% |
| 4 | 504,187 | +.0117% | 211,711 | 41.99% | 348,370 | 129,618 | 37.42% |
| 5 | 504,108 | -.0040% | 95,[illegible]09 | 19.01% | 342,754 | 57,068 | 16.65% |

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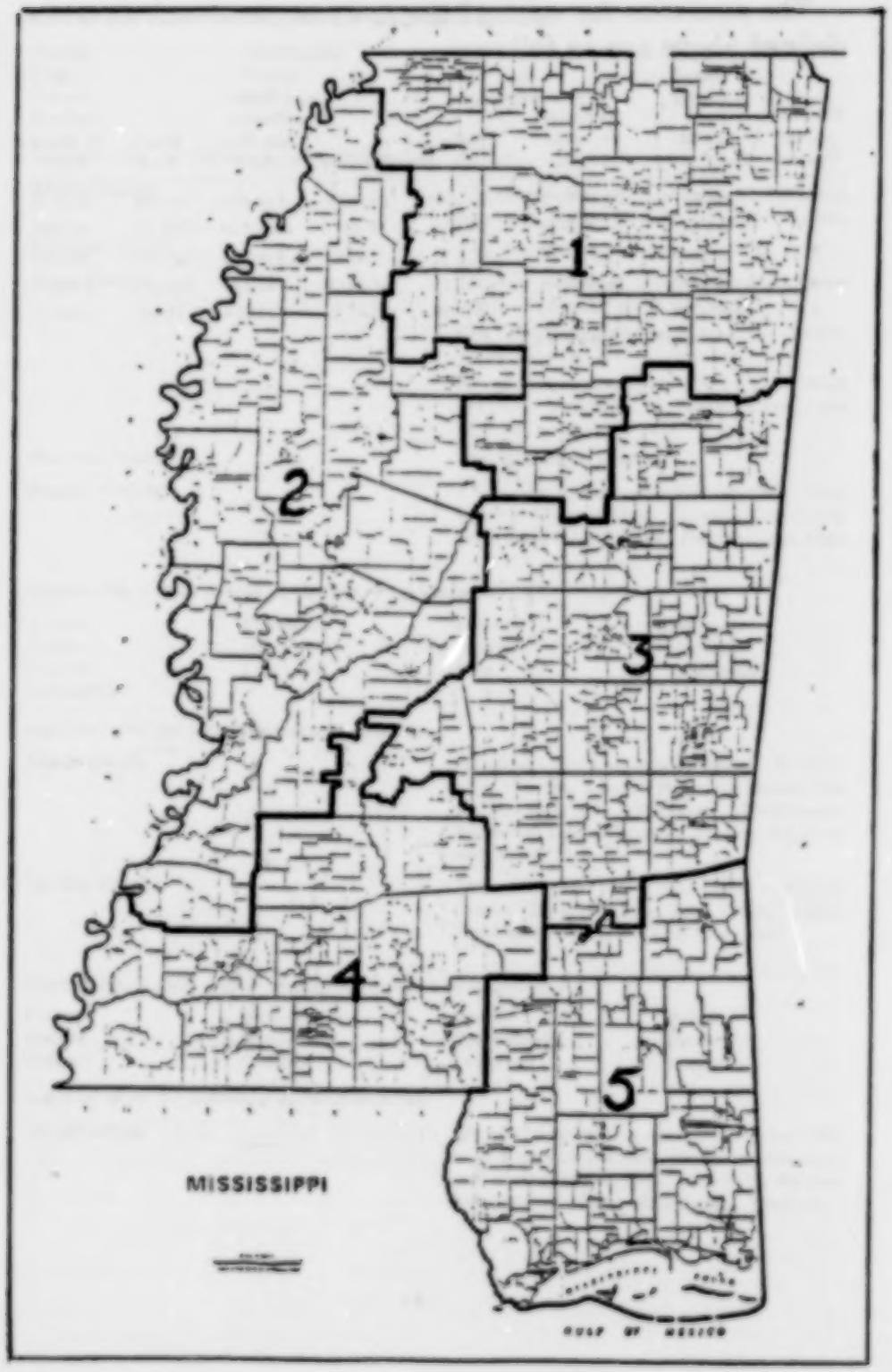




# APPENDIX C

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totally of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right

to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973C:

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification,



prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Supreme Court, U.S.
FILED
AUG 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2053

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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WILLIAM A. ALLAIN, *et al.*,
*Appellants,*

v.

OWEN H. BROOKS, *et al.*

---

**On Appeal from the United States District Court for the Northern District of Mississippi**

---

## MOTION TO DISMISS OR AFFIRM OF OWEN H. BROOKS, ET AL., APPELLEES

---

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## QUESTIONS PRESENTED

In 1983 this Court vacated the District Court's 1982 court-ordered plan (the "Simpson plan") and remanded the case for reconsideration in light of the 1982 amendment to Section 2 of the Voting Rights Act. *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983). On remand, after a two-and-a-half day trial, the District Court held that the Simpson plan unlawfully diluted black voting strength and denied black voters of Mississippi equal access to the political process in violation of Section 2. Although Mississippi is 35 percent black in population, all five congressional districts in the Simpson plan were majority white in voting age population. The District Court ordered into effect a revised court-ordered plan which created a new Second Congressional District in which black voters constitute 52.83 percent of the voting age population. Appellants are the *ex officio* members of the Mississippi State Board of Election Commissioners, consisting of the Governor, the state Attorney General, and the state Secretary of State. The questions presented are:

1. By failing to raise Questions I and II of their Jurisdictional Statement in the District Court, are these appellants now precluded from raising these questions in their appeal?

2. By failing to allege or prove any direct personal injury to them or to any legally-cognizable state interest resulting from the adoption of the District Court's new plan, do these appellants have standing to challenge the District Court's judgment?

3. Does Section 2 of the Voting Rights Act, as amended in 1982 to prohibit any voting practice which "results in" a discriminatory denial of the right to vote, require proof of discriminatory intent?

4. Does the District Court's 1982 ruling that the Simpson plan satisfies "federal standards" under Section

5 of the Voting Rights Act preclude a finding that the plan is invalid under amended Section 2?

5. Are the District Court's findings of fact that equal black voter participation in Mississippi and in the Delta area is impeded by the effects of past official discrimination and by socio-economic disparities between blacks and whites and that racial bloc voting has prevailed in Mississippi elections and in the 1982 Second District congressional election unsupported by the record and "clearly erroneous" under Rule 52(a), Fed. R. Civ. P.?

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IN THE

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---

## MOTION TO DISMISS OR AFFIRM OF OWEN H. BROOKS, ET AL., APPELLEES

---

Appellees Owen H. Brooks, et al., eleven black voters of Mississippi who reside in the Delta area of the state,[1] move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal, or, alternatively, to affirm that portion of the District Court's judgment invalidating its 1982 court-ordered plan (the "Simpson plan") on findings that that plan, particularly as regards the Second District, results in a denial or abridgement of the right to vote on account

[1] This motion to dismiss or affirm is being filed on behalf of Owen H. Brooks, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert L. Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, who are representatives of a class certified by the District Court comprised of all black registered voters of Mississippi.

of race or color because "the political processes in District 2 in particular are not equally open to participation by members of a class protected by Section 2(a) of the amended Act in that the members of that class have less opportunity than other members of the electrorate to participate in the political processes and to elect representatives of their choices." J.S., Appendix B, p. 25a.

Appellees move the Court to dismiss or affirm this appeal without prejudice to their own appeal, *Brooks* v. *Allain*, No. 83-1865 (docketed May 15, 1984), in which they contend that the District Court's new 1984 court-ordered plan has not provided an adequate remedy for the Voting Rights Act violation because it does not entirely eliminate dilution of minority voting strength found in the prior plan and continues to deny black voters of the Mississippi Delta area an equal opportunity to participate in the political processes and to elect representatives of their choice.

## STATEMENT OF THE CASE

We have previously given a more extensive description of this litigation than is contained in the appellants' Jurisdictional Statement in our Jurisdictional Statement in *Brooks* v. *Winter*, No. 83-1865, and in our Motion to Dismiss or Affirm in *Mississippi Republican Executive Committee* v. *Brooks*, No. 83-1722.

## MOTION TO DISMISS

Appellees move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal, which is being filed on behalf of the *ex officio* members of the Mississippi State Board of Election Commissioners (the Governor, Attorney General, and Secretary of State). These appellants did not raise or argue in the District Court Questions I or II presented in their Jurisdictional Statement. The District Court's opinion is explicit that the question embraced in Question I was raised only by the Mississippi



Republican Executive Committee (the "Republican Defendants"), and not by the state official defendants (J.S., App. A, p. 7a). Question II was not passed on by the District Court. Thus, since these appellants did not raise these issues in the District Court, this Court is precluded from addressing them in this appeal. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 (1978).

As to Question III, these appellants lack standing required by Article III of the U.S. Constitution to challenge the District Court's decision vacating its prior court-ordered plan and ordering into effect a new court-ordered plan, absent some showing—which has not been made on this record—of personal injury to appellants directly traceable to the District Court's action which is likely to be redressed by action of this Court. *Allen* v. *Wright*, No. 81-757 (July 3, 1984) (slip op. at 12-13); *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, *supra*, 438 U.S. at 80. Also, appellants do not, and can not, make any argument that the District Court's new plan impinges on some legally-cognizable state interest because since 1981 the Mississippi Legislature has failed to act on any new congressional redistricting plan, and the decision below simply substitutes one court-ordered plan for another, very similar court-ordered plan.

For these reasons, this appeal should be dismissed.

## MOTION TO AFFIRM

Alternatively, if this Court rules that it has jurisdiction over this appeal and that the questions presented are properly before the Court, the District Court's decision, insofar as it vacates its prior court-ordered plan, should be summarily affirmed.

1. Appellants' argument that the 1982 amendment to Section 2 of the Voting Rights Act, which prohibits any voting practice or procedure which "results in" a discriminatory denial of the right to vote on account of race or language minority status, requires proof of discriminatory purpose is, as the District Court correctly ruled, contradicted by the plain language of Section 2, its legislative history, and judicial and scholarly interpretation.

2. A finding that the prior court-ordered plan is valid under Section 5 of the Voting Rights Act does not preclude a finding that it is invalid under amended Section 2 because Section 2, as amended in 1982, provides a more extensive and comprehensive cause of action for racially discriminatory voting and election practices, and is not limited in any way by the provisions of Section 5.

3. The District Court's findings of fact are amply supported by the evidence presented at trial, and there is no basis for appellants' argument that the District Court's findings of fact are clearly erroneous under Rule 52(a), Fed. R. Civ. P.

## I. APPELLANTS' ARGUMENT THAT AMENDED SECTION 2 REQUIRES PROOF OF DISCRIMINATORY PURPOSE FAILS TO PRESENT A SUBSTANTIAL QUESTION.

Appellants in this appeal simply repeat the baseless argument made by the Mississippi Republican Executive Committee in its appeal, J.S., No. 83-1722, pp. 12-22, that the "results" standard of the 1982 amendment to Section 2 of the Voting Rights Act, because it borrows from language used by this Court in *White* v. *Regester*, 412 U.S. 755 (1973),[2] requires proof of discriminatory

[2] Appellants fail to note that the statutory standard also incorporates the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), see S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07. *Zimmer* expressly incorporated an effects standard and interpreted this Court's prior decisions to hold that proof of discriminatory motivation was not required, 485 F.2d at 1304 and n. 16.



intent. The District Court found this argument "to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judiciai and scholarly interpretation." J.S., App. A, pp. 6a-7a n.5.

The District Court's decision is clearly correct, and it is manifest that appellants' argument is so unsubstantial as not to need further argument. Every court which has construed the 1982 amendment to Section 2—now including the Courts of Appeals for the Fifth, Sixth, Seventh, and Eleventh Circuits—has ruled that the congressional purpose beind it was to eliminate the requirement of proving discriminatory intent to establish a violation of Section 2. See, e.g., *Ketchum* v. *Byrne*, Nos. 83-2044, 83-2065, and 83-2126 (7th Cir. May 17, 1984) (slip op. at 8-10); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1563-64 (11th Cir. 1984); *Jones* v. *City of Lubbock*, 727 F.2d 364, 375, 378-80 (5th Cir. 1984); *Valesquez* v. *City of Abilene*, 725 F.2d 1017, 1021-23 (5th Cir. 1984); *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1071-72 (6th Cir. 1983). Every court which has considered the argument made by the appellants here has found it to be totally without merit. See, e.g., *United States* v. *Marengo County Commission*, *supra*, 731 F.2d at 1564 n.29 ("The statute and committee reports, however, could not be clearer [that Section 2 does not contain an intent requirement]."); *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 380 ("We cannot adopt the City's position that Congress absent-mindedly reimposed a standard that the legislative history so carefully rejects. No court that has considered amended Section 2 has adopted the City's view of the congressional intent."); *Valesquez* v. *City of Abilene*, *supra*, 725 F.2d at 1023 ("This argument is absolutely without merit.").

First, the plain language of the statute itself prohibits any voting practice or procedure which "results in" voting discrimination against a protected group.[3] See J.S., App. C, p. 31a. Under Section 2(b) a violation is shown when protected minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

> Nowhere does this section use the words "intent," "motive," "purpose," or other language which might suggest a subjective standard of proof. On the contrary, the plain meaning of the language of Section 2 is that no proof of intent or purpose to discriminate need be shown.

McKenzie and Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 Harv. Civ. Rights-Civ. Lib. L. Rev. 155, 160 (1984) (footnote omitted).

Second, both the House and Senate committee reports show that the purpose of the Section 2 amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision." H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 29 (1981). See also, *id.* at 2, 28-31. "S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 97-417, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 179. See also, *id.* at 15-39, 67-68. The Senate report is particularly explicit that a court may find a Section 2 violation based on the evidentiary factors taken from *White* and *Zimmer* "without any need

[3] "The starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).



to decide whether those findings, by themselves, or with additional circumstantial evidence, also would warrant an inference of discriminatory purpose." *Id.* at 28 n.112. The Senate report further states:

> The motivation behind the challenged practice or method is not relevant to the determination. The Committee expressly disavows any characterization of the results tests codified in this statute as including an "intent" requirement, whether or not such a requirement might be met in a particular case by inferences drawn from the same objective factors offered to establish a discriminatory result. Nor is there any need to establish a purposeful design through inferences from the foreseeable consequences of adopting or maintaining the challenged practice.

*Id.* at 67-68 (footnotes omitted).

Although the statutory language of Section 2(b) and the evidentiary factors which may be used to prove a violation (see *id.* at 28-29) come from *White* v. *Regester*, *Zimmer* v. *McKeithen*, and their progeny, Congress made it explicit that in enacting this statute it was codifying its understanding of pre-*City of Mobile* v. *Bolden* law under those decisions as incorporating a "results" test and that no proof of discriminatory purpose was required. See H.R. Rep. No. 97-227, *supra*, at 29-30; S. Rep. No. 97-417, *supra*, at 28; Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 725-26 (1982).

The opposition in Congress to this new legislation was led by Representative Henry Hyde in the House and Senator Orrin Hatch in the Senate, see Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 725-26 n.236, and it is their statements upon which appellants rely for their argument (J.S., pp. 6-7). Representative Hyde and Senator Hatch, among other opponents, at-

tempted to sabotage this new legislation in Congress by arguing that, because the statutory language was borrowed from this Court's *White* v. *Regester* decision, it incorporates the intent standard which this Court later construed *White* v. *Regester* to contain. See *United States* v. *Marengo County Commission*, *supra*, 731 F.2d at 1564 n.29 (citations to statements of opponents); Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 725-26 n.236; Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, ch. 7 in MINORITY VOTE DILUTION (C. Davidson, ed. 1984), esp. at 154-57 (describing strategy of amendment's opponents). The quotation attributed to Senator Hatch in appellants' Jurisdictional Statement (p. 7) in which—notwithstanding the statutory language and the statements of the purpose of this legislation in the committee reports—he invited the courts to interpret the Section 2 amendment to require proof of discriminatory intent, is extracted from a two-page footnote which Senator Hatch appended to his additional views in the Senate report after he had vigorously argued against the Section 2 amendment, voted against it in committee deliberations, and filed 90 pages of additional views attacking the "results" test and the amendment adopted by the Senate Judiciary Committee. Derfner, *supra*, at 156. Similarly, the statement attributed to Representative Hyde in the Jurisdictional Statement (pp. 6-7) was not even made on the floor of the House of Representatives, but was inserted in the Congressional Record after the floor debate and after the bill had been passed overwhelmingly in the Senate and was returned to the House for agreement with the Senate amendments. Derfner, *supra*, at 157.

These views expressed by Senator Hatch and Representative Hyde were sharply disputed by the Senate and House co-sponsors of the legislation.[4] Senator Kennedy,

[4] "It is the sponsors [of a bill] that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).



who was an original co-sponsor of the bill and who helped manage the floor debate in the Senate, repudiated Senator Hatch's interpretation:

> Let there be no question then. We are writing into law our understanding of the White test. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose. But should the Highest Court in the land—or a majority of the Court—conclude there is a purpose element in White, then the committee nonetheless has drafted a bill that does not incorporate this requirement, and that is the ultimate legislative intent of the bill we are adopting here tonight.

128 Cong. Rec. S7095 (daily ed. June 18, 1982). Similarly, the other Senate sponsors and supporters of the bill emphasized in the strongest possible terms that the 1982 amendment to Section 2 contains no intent requirement. 128 Cong. Rec. S6930-31 (daily ed. June 17, 1982) (statement of Senator DeConcini); *id.* at S6941-44 (statement of Senator Mathias, an original co-sponsor and floor manager of the bill in the Senate); *id.* at S6956-65 (debate concerning amendment proposed by Senator East to restore the intent test; the amendment was rejected by a vote of 81 to 16); *id.* at S6995-96 (colloquy between Senator Kennedy and Senator Stevens); *id.* at S7119 (daily ed. June 18, 1982) (statement of Senator Dole); *id.* at S7138 (statement of Senator Robert Byrd). During the House debate following Senate approval of the bill, similar views were expressed by Representative James Sensenbrenner, co-sponsor of the House bill who advocated its passage in the House. 128 Cong. Rec. H3841 (daily ed. June 23, 1982).

The District Court's carefully considered interpretation of the amended Section 2 is manifestly correct, and no further argument on this issue is required. No court which has construed this legislation has accepted appellants' erroneous argument, and every court which has

considered it has found it to be totally without merit. Appellants simply reiterate arguments unsuccessfully made by those who opposed passage of this legislation in Congress, and whose position was decisively rejected by overwhelming votes of both houses of Congress. The District Court's interpretation of the amended Section 2 should be summarily affirmed.

## II. APPELLANTS' ARGUMENT THAT A FINDING OF VALIDITY UNDER SECTION 5 PRECLUDES A FINDING OF A SECTION 2 VIOLATION IS TOTALLY WITHOUT MERIT.

In their second argument, appellants contend that (1) in its prior decision, rendered in 1982, 541 F. Supp. 1135, *vac'd and remanded*, 103 S.Ct. 2077 (1983), the District Court "specifically found that the Simpson plan met the requirements of Section 5" (J.S., p. 8); and (2) "[t]he legislative history of Section 2 demonstrates that a finding of validity under Section 5 satisfies Section 2" (*id.*). This argument is totally without merit.

First, as appellants themselves recognize (J.S., p. 8), the District Court did not actually grant Section 5 preclearance to the Simpson plan.[5] Following *Upham* v. *Seamon*, 456 U.S. 37 (1982), and *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the District Court was only required to determine whether or not its court-ordered plan met Federal constitutional and statutory standards, including whether it was sufficient to remedy the Section 5 objection which the Attorney General interposed to the Mississippi Legislature's 1981 statutory plan. See 541 F. Supp. at 1141-43. In our appeal from the District

[5] As a local three-judge District Court in Mississippi, the District Court lacked the authority which Congress has reserved to the District Court for the District of Columbia to grant Section 5 preclearance to any voting law change. *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).



Court's 1982 ruling, we contended that the District Court misconstrued *Upham* v. *Seamon* in choosing the Simpson plan as a court-ordered plan and failed fully to remedy the basis of the Attorney General's Section 5 objection. That argument was not passed upon by this Court in our appeal and became moot when this Court vacated the District Court's decision and remanded the case for reconsideration in light of the 1982 amendment to Section 2. *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983). Because the District Court's determinations that the Simpson plan satisfied "these federal considerations" and "federal standards" (541 F. Supp. at 1142) were vacated by this Court in the 1983 appeal, appellants should now be precluded from relying upon them.

Second, appellants fail to recognize the differences between the Section 5 "effect" standard and the Section 2 "results" standard, and they misconstrue the legislative history of the 1982 amendment to Section 2 on this point. In *Beer* v. *United States*, 425 U.S. 130, 141 (1976), this Court construed the Section 5 "effect" test in a limited manner to prohibit only voting law changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This Section 5 "effect" standard, therefore, does not prohibit all racially discriminatory voting laws, but prohibits only voting law changes which diminish the effective voting strength of protected minorities. See *City of Lockhart* v. *United States*, 103 S.Ct. 998 (1983).[6]

Section 2, on the other hand, provides a broader and more comprehensive cause of action for racially discrimi-

[6] The Court has not yet decided whether, in enacting the 1982 amendment to Section 2, Congress intended to incorporate the new Section 2 "results" test in Section 5 determinations. There is persuasive evidence that it did. See, e.g., S. Rep. No. 97-417, *supra*, at 12 n. 31. This question is not presented in this appeal, however, since the alleged District Court determination upon which appellants rely was made prior to the enactment of the Section 2 amendment.

natory voting practices or procedures. It prohibits any voting scheme which "results in" racial discrimination and under which protected minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," whether or not the challenged scheme is a voting law change and whether or not the challenged plan is retrogressive as compared with some prior plan.

The two sections, therefore, have had different standards of proof and different criteria for a violation. Under the Section 5 "effect" standard, the principal question has been whether or not the voting law change has a retrogressive effect on the voting strength of protected minorities. Under the Section 2 "results" standard, the principal question is whether or not "based on the totality of the circumstances" protected minorities are denied equal access to the political process and an equal opportunity to elect candidates of their choice. Unlike Section 5, Section 2 does not necessarily entail a comparison of the numerical voting strength of minorities before and after a challenged redistricting plan or other voting system is adopted.

Accordingly, a challenged voting scheme could pass muster under the Section 5 retrogression standard in effect prior to the 1982 amendment to Section 2 by not diminishing pre-existing levels of minority voting strength, but still violate the Section 2 "results" standard by denying minority voters equal access to the political process.

In enacting the 1982 amendment to Section 2, Congress was aware of the limitations of the Section 5 retrogression standard and employed a different standard by using the word "results" in Section 2 instead of "effect," the Section 5 language. See McKenzie and Krauss, *Section 2 of the Voting Rights Act*, *supra*, 19 Harv. Civ. Rights-Civ. Lib. L. Rev. at 168-71. The legislative history of the 1982 amendment to Section 2 indicates that this



choice of language was a conscious decision not to limit the "results" standard of Section 2 to the "effect"/retrogression test of Section 5:

> By referring to the "results" of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory "effect" under Section 5 of the Act.

S. Rep. No. 97-417, *supra*, at 68. The Senate Report shows that Congress, in making this choice, was fully aware of the different standards of proof under Section 2 and Section 5: "Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group." *Id.* at 68 n.224. See also, *id.* at 138-39 (Report of the Senate Subcommittee on the Constitution). This distinction also was made explicit by Representative Sensenbrenner during the floor debate in the House:

> The section 2 standard is not the same as the section 5 standard. This means not only that section 2 is governed by the totality of the circumstances factors, but it also means that the retrogression requirement of Beer against United States does not apply to section 2 cases—although of course, such a retrogression would be relevant evidence in a section 2 case.

128 Cong. Rec. H3841 (daily ed. June 23, 1982).[7]

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[7] Appellants' discussion of eight lines in the Senate report discussing the Savannah municipal annexation (J.S., pp. 8-9) does not constitute a congressional determination that any plan approved under Section 5 must necessarily satisfy Section 2. The Savannah discussion is taken completely out of context. In this section of its report, S. Rep. No. 97-417, *supra*, pp. 34-35, the Senate Judiciary Committee was responding to charges made by Assistant Attorney General William Bradford Reynolds and by the Senate subcommittee, chaired by Senator Orrin Hatch, that the Section 2 "results" test would result in wholesale invalidation of election structures in

Because Section 2 and Section 5 employ different legal standards, and because Congress in enacting the 1982 amendment to Section 2 was careful not to make a Section 2 violation dependent upon a showing of a Section 5-prohibited retrogression, appellants' argument that the District Court's determination—prior to the 1982 amendment to Section 2—that the Simpson plan meets "federal considerations" and "federal standards" precludes a finding of a Section 2 violation clearly is wrong. The District Court's ruling that the Simpson plan failed to pass muster under the 1982 amendment to Section 2 is correct, notwithstanding its prior determination that it met "federal considerations" and "federal standards." [8]

The utter meritlessness of appellants' argument is further demonstrated by court rulings handed down since 1982 striking down redistricting plans approved by the Attorney General under Section 5 for violations of Section 2. In *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La.

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a large number of named cities throughout the country. The Senate Judiciary Committee was making the point that lack of proportional representation for minorities, at-large elections or multimember districts, and one other factor, such as a past history of *de jure* segregated schools, standing alone, would not be sufficient to establish a Section 2 violation (*id.* at 34).

The subcommittee had listed Savannah as one city which could be sued under the new Section 2 because two of the eight city council members were elected at-large, and because only two were black in a city which was 50 percent minority. See *id.* at 157. The Senate Judiciary Committee simply noted that the Justice Department, in preclearing the municipal annexation under Section 5, had determined that "the annexation was not objectionable because the election system provides black voters with adequate opportunity for participation and fair representation." *Id.* at 35.

[8] Contrary to appellants' argument, the District Court did not displace the Simpson plan because it failed to maximize black voting strength or to insure that a black candidate would get elected (J.S., pp. 9-10). To the contrary, it rejected plaintiffs' proposed plans, erroneously we contend (J.S., No. 83-1865), because they could result in the election of a black member of Congress (J.S., App. A, p. 15a).



1983) (three-judge court), the court held that the Section 5 preclearance by the Attorney General of the Louisiana congressional redistricting plan, which contained the distorted "Donald Duck" district which diluted black voting strength, was no bar to a finding that the plan violated Section 2:

> Since the statutory standards of review under § 5 differ from those established by amended § 2, Report on S. 1992 of the Senate Committee on the Judiciary, S. Rep. No. 97-147, 97th Cong., 2d Sess. (1982) at 68, 138-39, U.S. Code Cong. & Admin. News, p. 177, a grant or denial of preclearance pursuant to § 5 is not dispositive of a § 2 claim.

574 F. Supp. at 327 n.1. Similarly, in *Gingles* v. *Edmisten*, Civil No. 81-803-CIV-5 (E.D.N.C. January 27, 1984) (three-judge court), *appeal docketed sub nom. Edmisten* v. *Gingles*, No. 83-1968 (June 2, 1984), 52 U.S.L.W. 3908, the District Court struck down the North Carolina legislative reapportionment plan for Section 2 violations even though it had been precleared by the Attorney General under Section 5. In *Buskey* v. *Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983), the court ruled that the Montgomery, Alabama, city council redistricting plan violated Section 2, even though that plan had passed Section 5 review by the Justice Department.

The legislative history of amended Section 2 and court decisions interpreting Section 2 are unanimous that a finding of Section 5 validity does not in any way preclude a finding of Section 2 invalidity. There is no conflict of authority on this issue, and no substantial question is presented which requires plenary consideration by this Court.

## III. THE DISTRICT COURT'S FINDINGS THAT THE SIMPSON PLAN DENIED BLOCK VOTERS EQUAL ACCESS TO THE POLITICAL PROCESS AND AN EQUAL OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellants do not challenge the District Court's finding that the 1982 court-ordered plan, the Simpson plan, diluted black voting strength because it combined the majority black population of the Mississippi Delta area with six predominantly white Hill counties in east-central Mississippi, thereby diminishing the impact of black votes in the Delta area. J.S. App. A, p. 11a; App. B, p. 25a. The District Court concluded that this dilution of black voting strength in the Simpson plan violated Section 2 on evidence showing an "aggregate" (*id.*, p. 8a) of the evidentiary factors which Congress has determined would constitute proof that minority voters are denied equal access to the political process and an equal opportunity to elect candidates of their choice (*id.* at 7a-8a).

The court found that Mississippi has a "long history" of official racial discrimination in voting, which "includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering to vote." *Id.* at 8a-9a. The court found that the effects of this past discrimination "presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration." The court also found that these effects continue to persist in the relatively low number of black elected officials in Mississippi: "No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties" (*id.* at 9a).



The court found that the "lingering effects of this past discrimination" (*id.* at 10a) persist in socio-economic disparities between whites and blacks. Blacks in the Delta area have disproportionately lower median family income ($7,447 for blacks, as compared with $17,467 for whites), less education (more than half have less than nine years of education, while the majority of whites are high school graduates), unemployment rates which are two to three times higher than the white unemployment rate, and inferior housing conditions (*id.*, p. 10a). This evidence "is also probative of minorities' unequal access to the political process," the District Court determined (*id.* at 9a).

The District Court also concluded that racial bloc voting impedes equal black political participation in Mississippi and in the Delta area. The court found that "blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race" as shown by evidence of "a consistently high degree of racially polarized voting in the 1982 election and previous elections" (*id.* at 11a). Racial bloc voting "operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population," the court found (*id.* at 11a). Since the Second District was not majority black in voting age population "the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice" (*id.*).

The November, 1982 general election contest in the Second District under the Simpson plan was largely a head-to-head race between black veteran state Representative Robert Clark and white Republican nominee Webb Franklin. The Court found that "racial campaign tactics" by Franklin in the 1982 election " supports the con-

clusion that Mississippi voters are urged to cast their ballots according to race" and that "[t]his inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts." *Id.*, p. 12a.[9]

All of these findings are supported by substantial evidence and are sufficient for the District Court to find a violation of Section 2. See, e.g., *United States* v. *Marengo County Commission*, *supra*; *Jones* v. *City of Lubbock*, *supra*; *Gingles* v. *Edmisten*, *supra*; *Major* v. *Treen*, *supra*; cf. *Rogers* v. *Lodge*, 458 U.S. 613 (1982); *White* v. *Regester*, *supra*.

In this appeal, appellants challenge only two findings of the District Court relating to lower black voter participation rates in the Delta region stemming from the effects of historical official discrimination in Mississippi and socio-economic disparities between whites and blacks in the Delta, and to racial bloc voting in Mississippi elections, particularly in the 1982 congressional election in the Second District (J.S., pp. 10-13).

This issue, also, fails to present a substantial question for review. In recent decisions this Court has empha-

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[9] The trial testimony shows that during the campaign Franklin appealed to white racist sentiments by featuring Clark's picture in his campaign ads, a practice not normally done in Mississippi, by adopting the campaign slogan "He's one of us," a reference to the white Delta in-group, and by using television ads which evoked old segregationist symbols and code words (Tr. 63-87, Ex. P-71):

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.

J.S., App. A, p. 12a.



sized the deference Rule 52, Fed. R. Civ. P., requires reviewing courts to give a trial court's findings of fact. *Rogers* v. *Lodge*, *supra*, 458 U.S. at 622-23 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous." *Pullman-Swint*, *supra*, 456 U.S. at 287. The function of this Court is not to decide factual issues de novo, or to determine whether it would have made the findings the trial court did, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), but is limited to determining whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Great weight should be accorded trial court findings turning on peculiarly local conditions and circumstances "representing as they do a blend of history and an intensely local appraisal . . . in the light of past and present reality, political and otherwise." *Rogers* v. *Lodge*, *supra*, 458 U.S. at 622 (quoting *White* v. *Regester*, *supra*, 412 U.S. at 769-70); see also, *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 468 (1979) (Burger, C.J., concurring in judgment).

The challenged findings are amply supported by substantial evidence and are not clearly erroneous.[10] On the issue of lower registration and turnout by blacks in Mississippi, the State of Mississippi conceded in a companion congressional redistricting case to this one, *Mississippi* v. *Smith*, in a stipulation also admitted in evidence in this

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[10] At the trial, the Brooks plaintiffs presented the testimony of eight plaintiffs through trial depositions, the trial deposition testimony of the Executive Director of the Leadership Conference on Civil Rights on Franklin's voting record on civil rights issues, the testimony of four expert witnesses, and more than 50 documentary exhibits. Defendants (appellants here) presented only two witnesses, a Franklin campaign aide/legislative assistant and the Director of Computer Services and Redistricting of the Republican National Committee, and 12 documentary exhibits.

case, that black citizens in Mississippi generally have lower political participation rates than whites:

> 14. The effect of Mississippi's past history of discrimination in voting and in other areas continues to affect black people in many portions of the state today, which has resulted in a generally lower participation by blacks than whites in the political process. Consequently, proportionately fewer blacks are registered to vote than whites, and black voters turn out at the polls at a lower rate than white voters.

Ex. P-1, pp. 4-5. Thus, appellants in this appeal are attempting to impeach the State's own stipulation, entered into by the same counsel who are representing these state officials in this appeal. These facts were confirmed by the testimony of the plaintiffs, who are black community leaders in the Delta, that black registration in the Delta area is still disproportionately lower than white registration.[11]

Dr. Gordon G. Henderson, a political scientist with extensive experience in analyzing Mississippi elections, also confirmed that blacks in the Delta area have lower participation rates in his statistical analysis of voting behavior in the 1982 general election in the Second District (Ex. P-76). Dr. Henderson found that although in this hotly contested race turnout by whites and blacks was approximately the same when measured as a percentage of registered voters, with black registered voters turning out at a rate of only 1.6 percentage points less than white registered voters, nevertheless there was a gap of 18 percentage points in voter turnout

[11] Ex. P-22, trial deposition of Dr. Robert E. Young, pp. 28-29, 53; Ex. P-23, trial deposition of Gregory Flippins, pp. 11-13, 20; Ex. P-24, trial deposition of Attorney Thomas Morris, pp. 5, 11-12; Ex. P-25, trial deposition of Samuel McCray, pp. 5-7, 8-12, 17-18, 35-38, 65, 92; Ex. P-26, trial deposition of Charles McLaurin, pp. 10-12; Ex. P-27, trial deposition of Jake Ayers, pp. 8-11; Ex. P-28, trial deposition of Clarence Hall, p. 6; Ex. P-30, trial deposition of Attorney Edward Blackmon, Jr., pp. 7, 13-15, 28-30.



when participation was measured by voting age population, rather than by registered voters (Tr. 109-10). These statistics showed that 56.27 percent of the white voting age population turned out to vote in this election, as compared with only 37.58 percent of the black voting age population (Tr. 109-110, Ex. P-76, p. 9). He concluded that this difference

> clearly reflects a well known, long-observed tendency on the part of blacks in Mississippi, including this Second Congressional District, not to be registered. And if they are not registered to begin with, clearly they are not going to be able to vote.

Tr. 110-11.

In addition, Dr. William P. O'Hare, a sociologist specializing in demography and senior research analyst at the Joint Center for Political Studies in Washington, conducted an extensive analysis of the socio-economic differences between whites and blacks in the Second District (Tr. 15-45, Ex. P-66). This analysis showed that blacks in the Delta area are severely disadvantaged in such areas as income, education, employment, housing, and health. Dr. O'Hare testified, based on Census Bureau publications and extensive literature in the field, that these socio-economic characteristics are directly related to political participation rates measured by voter registration and turnout (Tr. 33-39) and concluded that "due to differences in age structure and socio-economic characteristics, blacks do not have an equal opportunity to participate [in the political process in the Second District]" (Tr. 40, also Ex. P-66, p. 40). Thus, the District Court's conclusion that "[t]he evidence of socio-economic disparities between blacks and whites in the Delta area and in the state as a whole is also probative of minorities' unequal access to the political process in Mississippi" is based, not as appellants have represented only on the legislative history of amended Section 2 and case law (J.S., p. 11) or "guessing" (*id.*, p. 12), but upon the

expert witness testimony admitted in this case specifically on this point.

Appellants did not call any witnesses or introduce any evidence to refute the testimony of the black Delta political leaders, Dr. Henderson, or Dr. O'Hare, and thus their testimony is uncontradicted in this record.

To attempt to impeach the District Court's findings, appellants rely exclusively on a 1982 Census document reporting statewide voter registration and turnout rates by race for the November, 1982 election. Under the circumstances, the District Court was entitled to give little weight to this document in making its findings. The Census document reported Mississippi statewide figures only, and did not report racial registration and turnout statistics by race for the Delta area or the Second District (Ex. P-48, p. 64), with which the District Court was primarily concerned. Even statewide, the report still showed disparities between white and black registration and voting (*id.*). The report was based on survey data, resulting in standard errors of 1.6 and 1.9 percentage points for whites and 3.0 and 3.5 percentage points for blacks because of the small number of blacks in the sample (Tr. 60-61, Ex. P-48, p. 64), and no effort was made to verify whether or not the information given by persons in the survey was accurate, that is, whether or not respondents who said they were registered or voted actually were registered or voted (Tr. 62). Dr. O'Hare, in analyzing this Census report, testified that the report standing alone was not sufficient to show that the socio-economic barriers to black political participation about which he testified were no longer a factor in Mississippi voting (Tr. 57-58).

As with voter participation rates, the District Court's findings on racial bloc voting also were based on Mississippi's stipulation in *Mississippi* v. *Smith*, admitted in evidence in this case:



> 15. Analysis of past election returns shows that racial bloc voting has prevailed throughout the State of Mississippi. Those participating in the electoral process suggest that racial bloc voting continues to occur throughout the state today.

Ex. P-1, p. 5. Black political leaders from around the Delta region provided direct testimony, including documentary evidence, from past and recent elections that Mississippi voters have voted and continue to vote for candidates on the basis of race.[12]

Since, as the District Court found, the state defendants "had conceded" racial bloc voting prior to the 1982 congressional election (J.S., App. A., p. 10a), the only issue at trial was whether or not there was racially-polarized voting in the 1982 Second District election. Dr. Henderson performed a regression analysis of the voting in the 1982 Second District election using 1980 Census voting age population data by race and the precinct election returns[13] and concluded that "there was decidedly racial

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[12] Ex. P-22, p. 25 (November, 1983 election for Washington County Circuit Clerk); Ex. P-23, p. 27 (Bolivar County elections); Ex. P-24, pp. 8, 15 (same); Ex. P-25, Nov. 16 dep., pp. 59-65, Nov. 28 dep., pp. 1-13, Exs. 1, 2, and 3 (Quitman County elections); Ex. P-26, pp. 14-24 (Sunflower County 1982 elections); Ex. P-27, pp. 15-16 (1983 Washington County election); Ex. P-28, p. 7 (Issaquena County elections).

There have also been prior judicial findings of racial bloc voting in Mississippi in cases involving the whole state, *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), and jurisdictions within the Second District, *Jordan* v. *City of Greenwood*, 534 F. Supp. 1351, 1354 (N.D. Miss. 1982), *vac'd and remanded on other grounds*, 711 F.2d 667 (5th Cir. 1982); *Donnell* v. *United States*, Civil No. 78-0392 (D.D.C. July 31, 1979) (three-judge court) (Finding 35, slip op. at 7), *aff'd mem.*, 444 U.S. 1059 (1980).

[13] Regression analysis has been widely accepted by the courts as a valid and reliable method of determining whether or not racially-polarized voting exists. See, e.g., *McMillan* v. *Escambia County*, 638 F.2d 1239, 1241-42 n. 6 (5th Cir. 1981), *on rehearing*, 688 F.2d

bloc voting in the general election" "to a high degree" (Tr. 109). His statistical analysis of the voting patterns (Ex. P-76, p. 9) showed that 82.19 percent of the white voters voted for the white candidates in the Second District,[14] with Clark, the black candidate, receiving only 17.89 percent of the white vote, while Clark received 96.49 percent of the black vote (Tr. 109).

Appellants did not do any statistical analysis of voting behavior in the Second District congressional election (Tr. 432). Their own expert, Dr. Thomas B. Hofeller, Director of Computer Services and Redistricting for the Republican National Committee, agreed with Dr. Henderson's conclusion that there was racial bloc voting in that election:

> I think that, as I stated in my deposition, that there is really no doubt in anybody's mind that there are polarized voting patterns as between the races in this area. And that in truth it's not necessary to do a regression analysis in order to ascertain that fact.

Tr. 399; also Tr. 420-21, 431, 434-35. The substance of their case was that, since Clark lost by less than 3,000 votes, there might have been other factors which contributed to his defeat, including philosophical views of the candidates and voters, partisan affiliations and voting behavior, and the like (Tr. 400). However, Dr. Hofeller admitted that he had not conducted any statistical analysis to determine whether any other factors were significant or the weight which might be attributable to other, nonracial factors (Tr. 402-03).[15]

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960 (5th Cir. 1982), *vac'd and remanded on other grounds*, 104 S.Ct. 1577 (1984); *Gingles* v. *Edmisten*, *supra* (slip op. at 48-52); *Major* v. *Treen*, *supra*, 574 F. Supp. at 337-39.

[14] In addition to Franklin, there was a minor white candidate who received few votes.

[15] Judge Higginbotham's special concurring opinion, attached not to the Fifth Circuit's decision in *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984), but rather to a simple per curiam order denying the petition for rehearing, 730 F.2d 233 (5th Cir. 1984), upon which appellants rely, did not garner the vote of any other judge of the Fifth Circuit, does not represent any ruling of the Fifth Circuit, and is fundamentally inconsistent with the Congressional intent in amending Section 2. The legislative history of the Section 2 amendment shows that one factor to be considered is: "the extent to which voting in the elections of the state or political subdivision is racially polarized." S. Rep. No. 97-417, *supra*, p. 29. Congress was concerned with racially polarized voting which impedes the election opportunities of minority group members, H.R. Rep. No. 97-227, *supra*, p. 30, and with election systems which "permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority." *Id.* Given the descriptions of this criteria in the legislative history, and the cases cited, a descriptive statistical analysis showing a high degree of association between race and voting behavior should be sufficient to meet this criterion. There is no evidence in this legislative history of any Congressional intent to place on plaintiffs in voting rights cases the difficult and expensive burden of proving any motivational analysis, or, in the presence of statistics showing a high correlation between race and voting, of quantifying any of the other variables which might influence elections and excluding the likelihood that factors unrelated to race might have had some influence.

In any event, given that in this case, as in *Jones* v. *City of Lubbock*, there was no statistical evidence presented by the defendants to rebut plaintiffs' proof, even on Judge Higginbotham's analysis there is no basis for concluding that the District Court's findings are clearly erroneous. See 730 F.2d at 236.



In these circumstances, the trial court, which heard the courtroom testimony of these expert witnesses and analyzed their documentary evidence, was in the best position to judge the credibility of the witnesses and the weight to be given to their testimony. Defendants' evidence was considered by the trial court (J.S., App. A, p. 10a). Given the strong statistical evidence showing a high degree of racial bloc voting in the election results, it is unlikely on this proof that other, nonracial factors would have had as strong a bearing on the election results as the racial factor. The District Court's findings on this issue are correct and supported by overwhelming and uncontradicted evidence.

## CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this appeal should be dismissed, or those portions of the District Court's judgment invalidating the 1982 court-ordered Simpson plan as violative of plaintiffs' rights secured by Section 2 of the Voting Rights Act, as amended in 1982, should be affirmed.

Respectfully submitted,

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No. 83-2053

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

William A. Allain, et al., Appellants

v.

Owen H. Brooks, et al., Appellees

**On Appeal From The United States District Court For The Northern District Of Mississippi**

## STATEMENT OF THE APPELLEES, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, IN SUPPORT OF JURISDICTIONAL STATEMENT

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## STATEMENT OF THE APPELLEES, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, IN SUPPORT OF JURISDICTIONAL STATEMENT

### JURISDICTION

The Appellees, the Mississippi Republican Executive Committee, agree that the Court has jurisdiction to hear this case pursuant to 28 U.S.C. §1253.

The Jurisdictional Statement of William A. Allain, et al., was received by counsel for the Mississippi Republican Executive Committee on June 19, 1984. This statement in support of that Jurisdictional Statement is being filed within the time permitted by this Court's Rule 16.1.

### THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Appellees, the Mississippi Republican Executive Committee, agree that the questions presented by the Appellants, William A. Allain, et al., are substantial.



### CONCLUSION

The Appellees respectfully request this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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**On Appeal From The United States District Court For The Northern District Of Mississippi**

## APPELLANTS' SUPPLEMENTAL BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-2053

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WILLIAM A. ALLAIN, *et al.*,

*Appellants*,

v.

OWEN H. BROOKS, *et al.*,

*Appellees*.

---

**On Appeal From The United States District Court For The Northern District Of Mississippi**

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## APPELLANTS' SUPPLEMENTAL BRIEF

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Appellants William A. Allain, et al., filed a Jurisdictional Statement in the above-captioned appeal on June 14, 1984. Since the filing of the Jurisdictional Statement, the United States District Court for the Eastern District of Virginia has decided the case of *Collins* v. *City of Norfolk*, Civil Action No. 83-526-N (E.D. Va. July 27, 1984).

In *Collins* v. *City of Norfolk* several black citizens challenged Norfolk's counsel-manager form of government, together with its at-large method of election, under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (as amended). Several of the district court's conclusions of law are particularly relevant to the case at bar, and are directly contrary to the conclusions of the Court for the

Northern District of Mississippi which are challenged in this appeal.

**A. A Demonstrated Difference Between The Voting Patterns Of Racial Groups Does Not Establish The Existence Of Racially Polarized Voting.**

The appellants have argued in their Jurisdictional Statement that the district court incorrectly determined that racially polarized voting existed in Mississippi's Second Congressional District. The court relied solely on the appellees' evidence that blacks and whites tended to vote differently and that the racial make-up of a precinct often correlated with the race of the candidate who carried that precinct. In *Collins* the court specifically rejected this narrow definition of racial bloc voting. Rather the *Collins* court noted that variables such as age, ethnicity, education, income, incumbency, campaign expenditures, endorsements and name recognition must be factored into any credible analysis of racially polarized voting. App. at 15a-20a.

**B. Disparities Between The Socio-Economic Status Of Blacks And Whites Are Irrelevant To The Issue Of Vote Dilution Unless The Political Participation Of Blacks Is Depressed.**

The appellants contend that the fact that the socio-economic status of blacks is lower than that of whites is relevant only where the political participation of blacks is depressed. *See* J.S. at 11-12. In the instant case, the court determined that the ability of black citizens to participate in the political process was hindered by the fact that blacks had less income, less education and higher unemployment than whites. This finding was in direct conflict with Census Bureau statistics which showed that blacks and whites were registered and turned out to vote in near equal proportions. *See* J.S. at 12. In *Collins*, the court



held that socio-economic disparities have no relevance to the issue of vote dilution, when equal proportions of white and black citizens register and vote. App. at 51a.

**CONCLUSION**

For the reasons stated above and in the Appellants' Jurisdictional Statement, the Court should note probable jurisdiction of this cross-appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jerris Leonard, hereby certify that I have this day mailed a true and correct copy of the foregoing Appellants' Supplemental Brief dated September 17, 1984, to the following persons at their last known mailing addresses:

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# APPENDIX A

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**NORFOLK DIVISION**

## CIVIL ACTION NO. 83-526-N

HERBERT M. COLLINS, DR. H. MARKS, S. RICHARD, BARBARA C. PARHAM, WILLIAM E. SWINDELL, JR., DR. MILTON A. REID, NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GEORGE BANKS, and JULIAN HAZEL,
*Plaintiffs*,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; VINCENT J. THOMAS, Mayor, DR. MASON C. ANDREWS, JOSEPH A. LEAFE, REV. JOSEPH N. GREEN, JR., CLAUDE J. STAYLOR, JR., ROBERT E. SUMMERS, and MRS. ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD: PAUL D. FRAIM, MARTHA H. BOONE, and PAUL M. LIPKIN, members of the CITY OF NORFOLK ELECTORAL BOARD,
*Defendants*.

RECEIVED: JUL 27 1984

**MEMORANDUM OPINION**

This matter is before the Court following a nonjury trial which was held on May 21 to June 5, 1984. After hearing the evidence, the Court directed the parties to submit post-trial briefs addressing the factual and legal issues raised. Post-trial briefs have been received, and therefore the matter is now ripe for decision.

The plaintiffs in this action are seven black residents and registered voters of the City of Norfolk, Virginia and the Norfolk Branch of the National Association for the Advance-

ment of Colored People (NAACP). The defendants are the City of Norfolk, the seven members of the Norfolk City Council who were serving when this action was filed, the Norfolk Electoral Board and the three members of the Electoral Board.

The plaintiffs allege that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. Alternatively, they allege that the at-large system was adopted in 1918 and has been maintained for a racially discriminatory purpose in violation of their Fourteenth and Fifteenth Amendment rights and 42 U.S.C. § 1983.

The plaintiffs seek (1) a declaratory judgment that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength; (2) an injunction prohibiting the holding of future City Council elections under the at-large system; and (3) the replacement of the at-large system with a plan whereby all seven City Council members would be elected from wards or single-member districts. A motion to certify this action as a class action was denied by Order of February 23, 1984.

### I. Applicable Law

Two competing legal principles are applicable in this case. The first is that political systems or practices which deny minority voters access to the political system have been repeatedly struck down by the courts. *See, e.g., White* v. *Regester*, 412 U.S. 755, 765-70 (1973); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304-07 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam). The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. *See, e.g., Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971). These competing legal principles are directly involved in this case.



Section 2 of the Voting Rights Act, as amended in 1982, reads as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision ina matter *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its *members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: PROVIDED, That nothing is this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp. 1984) (emphasis added).

Congress amended Section 2 of the Voting Rights Act to prohibit electoral practices and procedures that create discriminatory results, even though the responsible governmental body had not installed or maintained the electoral practice or procedure in order to discriminate.[1] In amending the Act, Congress in effect overruled *City of Mobile* v. *Bolden*, 446 U.S. 55, 66-71 (1980), in which the Supreme Court held that a claim of denial of access to the political process by a minority group requires a showing of purpose to discriminate. Specifically, the *Bolden* Court held that both in an action based upon

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[1] The defendants do not challenge the constitutionality of amended Section 2, which has been held to be constitutional by a number of courts. *See, e.g., Jones* v. *City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983).

the Fourteenth and Fifteenth Amendments and in an action based upon Section 2 of the Voting Rights Act, as originally enacted, the plaintiffs were required to show an intent to discriminate. *Id.* at 62-65.

In amending Section 2, Congress sought to remove the requirement that proof of discriminatory intent was necessary to establish a violation of Section 2. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Co ie Cong. & Ad. News 177, 179; *see Jordan* v. *City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983). Congress endeavored to codify the holding in pre-*Bolden* cases, specifically the holding in *White* v. *Regester*, 412 U.S. 755 (1973). In *White*, The Supreme Court held that to sustain a claim of vote dilution the plaintiffs' burden is:

> to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

*Id.* at 766.

To establish a violation of Section 2, plaintiffs may show a variety of factors in an attempt to prove their case. The Senate Committee on the Judiciary included a list of typical factors in its report:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;



> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Two additional factors listed in the Senate Report as having probative value are:

> 1. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> 2. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

*Id.*

The factors listed in the Senate Report are similar to the factors articulated originally in *Zimmer* v. *McKeithen*, 485 f.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975) (per curiam). In *Zimmer*, the Fifth Circuit listed four "primary" or "principal" factors which should be considered in a vote dilution case. These factors are:

> 1. a lack of access to the process of slating candidates;
>
> 2. the unresponsiveness of legislators to the minority's particularized interests;
>
> 3. a tenuous state policy underlying the preference for multi-member or at-large districting; and

4. the existence of past discrimination which in general precludes effective minority participation in the election system.

*Id.* at 1305. The *Zimmer* court also listed four so-called enhancing factors, which tend to support the findings made relative to the four primary factors. These are:

1. the existence of large districts,
2. the existence of majority vote requirements;
3. the existence of anti-single shot voting provisions; and
4. the lack of provision for at-large candidates running from particular geographical subdistricts.

*Id.*

Both the *Zimmer* case and the Senate Report explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. *Zimmer*, 485 F.2d at 1305; S. Rep. No. 417, 97th Cong,. 2d Sess. 29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207. Rather, courts are to consider the existence, or lack of existence, of these factors in the *Zimmer* court's terms in the "aggregate," or as the language of Section 2 states, based upon the "totality of circumstances." It should be pointed out that the Senate Committee specifically stated that it did not intend that the factors be used "as a mechanical 'point counting' device." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.118, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

This Court, therefore, will examine seriatim the factors listed in *Zimmer* and in the Senate Report. The Court will make detailed findings of fact with reference to each factor which the plaintiffs allege is applicable, as required by Rule 52(a) of the Federal Rules of Civil Procedure. The Court is aware of the requirement that it discuss all substantial evidence contrary to its opinion. *See Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1020-21 (5th Cir. 1984). The Court will then weigh the factors and determine whether, "based on the totality of circumstances," the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council "are not equally open to participation" by the black citizens of Norfolk, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (Supp. 1984).



Should the Court determine that the plaintiffs have failed to prove a violation of Section 2 of the Voting Rights Act, the Court will then consider whether the plaintiffs have proven that their Fourteenth and Fifteenth Amendment rights have been violated. *Bolden* remains the law with regard to constitutional violations. *See Chapman* v. *Nicholson*, 579 F. Supp. 1504, 1507 (N.D. Ala. 1984). The Court will determine whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk.

## II. Findings Of Fact

### A. Introduction

According to the 1980 Census, Norfolk has a total population of 266,979 persons, of whom 60.8%, or 162,300, are white, and 35.2%, or 93,987, are black. The 1980 figures show that Norfolk has a total voting age population of 201,366, of whom 64.85%, or 130,595, are white and 31.48%, or 63,396, are black. Norfolk does not maintain voter registration figures by race.

The City of Norfolk currently is governed by a City Council consisting of seven members who are elected by the voters of the City in at-large elections. The seven members of the Council elect the mayor from amongst themselves. Members serve four-year terms, which are staggered. Three seats were at stake in the most recent election, which was held on May 1, 1984. The next election is scheduled for May, 1986, at which time the four remaining seats will be up for election. Elections are held every two years and always occur in even-numbered years.

At-large City Council elections have been held in Norfolk continuously since 1918, when a new City Charter was adopted. The Charter changed the form of City government to a city manager—council form of government.

Since at-large elections were instituted in 1918, three blacks have been elected to the Norfolk City Council. Joseph A. Jordan, Jr. was first elected to the City Council in 1968, and was reelected in 1972 and 1976. He served as vice mayor during his last two terms. When Jordan resigned from his seat on Council as a result of having been appointed a judge, Reverend Joseph N. Green, Jr. was appointed to fill Jordan's unexpired term. Rev. Green was elected to the City Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. The third black, Reverend John Foster, won a seat on the City Council in the May 1, 1984 election. Accordingly, for the period of July 1, 1984 through June 30, 1986, the seven-member Council will have two black members, Rev. Green and Rev. Foster.

### B. History of the adoption of the at-large system

The plaintiffs' historian, Dr. Peyton McCrary, and the defendants' historian, Dr. Peter Stewart, each presented their view of the history which preceded the adoption of at-large elections in Norfolk in 1918. The Court will briefly review that history, much of which is not in dispute.

The City of Norfolk received its Charter from the Crown and was incorporated as a borough in 1736. In 1845, Norfolk was incorporated as a city by the Virginia General Assembly. From 1816 to the present, the City Charters have provided for the at-large election of various municipal officers. The 1845 City Charter provided for a bicameral city council, consisting of the Common Council, which was elected at-large, and the Select Council, which was selected by the Common Council from amongst its own members. In 1873, the City Charter was amended to provide for the election of members of the Common Council from wards. The members of the Common Council



continued to appoint the members of the Select Council. The mayor continued to be elected at-large.

In 1882, the Virginia General Assembly adopted a new charter for the City of Norfolk, which provided for the election of the Common Council members from wards and the at-large election of the Select Council. The mayor was still to be elected at-large. Thereafter, control of the General Assembly changed hands, and in 1884 a new Norfolk Charter was adopted, which was indentical to the one adopted in 1873.

As a result of the adoption of the Virginia Constitution in 1902, which provided for a literacy test and a poll tax, most blacks and some whites were effectively disenfranchised. As a result of the imposition of these measures, black voter registration in Norfolk declined from 1,826 in 1900 to 504 in 1902. White voter registration also declined, from 6,732 in 1900 to 4,698 in 1902. The number of registered black voters, according to the State poll tax records for the City of Norfolk, fluctuated during the next fifteen years. The 1911 annexation of Huntersville, a predominantly black area, from Norfolk County resulted in an increase of from 38 to 154 registered black voters in that year. White voter registration also fluctuated during the period.

In 1906, the Virginia General Assembly adopted a new Norfolk Charter, which provided for the election of a Common Council of not less than fourteen nor more than forty members and a Board of Aldermen of not less than eight nor more than thirty members, each to be elected from wards. A three-member Board of Control, with combined legislative and administrative powers, was to be elected at-large. City officers, such as the Commonwealth's attorney, commissioner of revenue and city treasurer were to be elected at-large.

Efforts toward municipal reform were begun in Norfolk in 1913, by members of the Citizens Party, a group whose prime concerns were religion and morality. The black citizens of Norfolk were often associated with the Citizens Party. Members of the Norfolk Chamber of Commerce, wich favored the

adoption of a city manager form of government, were also aligned with the Citizens Party.

In August, 1915, the issue of whether to create a charter commission to study the adoption of a city manager form of government was submitted to Norfolk's voters. The measure was supported by a majority of those voting, but failed because it was not approved by a majority of all registered voters, as required by State law. The 1915 referendum had the support of the Norfolk Chamber of Commerce and the Citizens Party.

No further efforts for a new charter occurred until 1917, when State law was changed to allow voter approval of a charter change by a majority of the votes cast instead of by a majority of registered voters. In June, 1917, Norfolk's voters approved the establishment of a charter study commission. The Charter Commission issued the proposed charter in September, 1917, which provided for a city manager form of government and the at-large election of a small city council. A referendum on the adoption of a the new charter was set for November 20, 1917.

The main dispute between the plaintiffs' and defendants' historians concerns the interpretation to be accorded a series of advertisements which appeared in *The Virginian-Pilot* newspaper in the days before the election. The plaintiffs' expert, Dr. McCrary, conceded that but for the appearance of these advertisements, he "would have found it easier to believe that the race issue did not surface." (Tr. 412). The Court is of the opinion that prior to November, 1917, race was not an issue in the charter change campaign.

The issue of race was first raised by opponents of the charter change on November 9, 1917, according to newspaper accounts. They charged that the new charter would increase the political power of blacks because of the abolition of the white primary. The first advertisement raising the issue of race appeared in *The Virginian-Pilot* on November 13, 1917, seven days before the referendum. In that advertisement, headlined "The New Charter a Danger to White Supremacy," the oppo-



nents of the charter change claimed that passage of the charter would result in the qualification to vote of "nearly 2,000 Negro men." (Plaintiffs' Exh. 43). The opponents of the charter change repeated many of the same allegations in a November 16, 1917 advertisement entitled "White Supremacy."

The proponents of the new charter responded to the opponents' allegations in a November 17, 1917 advertisement headlines "Don't Let The Bosses Play Upon Your Sentiments." (Plaintiffs' Exh. 43). In the advertisement, the proponents argued that the issue of white supremacy and the black vote was irrelevant because the state qualifications for voting would remain the same under the 1902 Constitution. They repeated this argument in a November 19, 1917 advertisement.

After reviewing these advertisements, the Court adopts the view of defendants' expert, Dr. Stewart, that the issue of race was first raised by the opponents of the new charter and that the proponents of the new charter attempted to convince the voters that the real issue was efficient local government, not "the colored question." (Plaintiffs' Exh. 43). The charter proponents tried to convince the voters that the charter opponents were trying to distract them from the real issue, that is, whether a city manager form of government would be more effective.

On the date of the referendum, November 21, 1917, the state poll tax records show that approximately 360[2] blacks and approximately 7,910 whites were registered to vote in Norfolk. Based on these figures, blacks constituted just over 4% of the Norfolk electorate. In the most identifiably black precinct in the City, in Huntersville, there were between 100 and 200 blacks qualified to vote in the charter referendum. The voters in that precinct approved the new charter by a vote of 121 to 32.

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[2] According to the plaintiffs' expert, Dr. McCrary, there were 361 blacks registered to vote on the day of the referendum. The defendants' expert, Dr. Stewart, cites a figure of 358. The Court has therefore used an approximate figure of 360.

In 1918, the Virginia General Assembly adopted the new Norfolk City Charter. It provided for a five-member City Council, whose members were to be elected at-large for four-year terms. The terms were staggered such that three seats were to be filled during one election and the remaining two seats would be filled during one election and the remaining two seats would be filled in an election two years later. The city manager was to be appointed by the Council. The mayor was to be elected from amongst the Council members.

### C. The at-large system to date

In 1949, the Norfolk City Council agreed unanimously to recommend to the Virginia General Assembly that the number of seats on the Council be increased from five to seven. According to the November 9, 1950 *Virginian-Pilot* article reporting passage of the referendum raising the Council membership to seven, black voters were "greatly in favor of the change." (Defendants' Exh. 38). The first election to a seven-member Council occurred in 1952.

In 1968, the City Council adopted a resolution which created an Advisory Study Commission to study and evaluate the Norfolk Charter of 1918. The Commission, after much deliberation and consideration of public comments, issued its report on November 3, 1971. The nine-member Commission unanimously recommended the retention of the at-large system for election of the members of Council because "councilmen should be elected by and be responsive to the entire community rather than a portion of it." (Defendants' Exh. 44). The report added that the "Commission wishes to avoid the dangers of a ward or district system which might encourage councilmen to look after the interests of their own district at the expense of the overall interest of the entire City." (Defendants' Exh. 44). Edward Delk, a black attorney, was a member of the Commission. He testified at trial that he continues to favor retention of the at-large system.

The 1918 Norfolk Charter continues to be in effect today.



### D. Extent of history of official discrimination

The early history of Virginia demonstrates efforts to defeat black participation in electoral politics. Black voters were effectively disenfranchised as a result of the 1902 Constitution, which imposed the literacy test and poll tax. The literacy test remained in effect until passage of the Voting Rights Act in 1965. The poll tax was declared unconstitutional by the Supreme Court in 1966. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). Blacks were also precluded from participating in the primary elections of the Virginia Democratic Party by the "white primary" rule which went into effect in 1912. The "white primary rule" was declared unconstitutional by the United States Court of Appeals for the Fourth Circuit in 1930. *Bliley* v. *West*, 42 F.2d 101 (4th Cir. 1930).

Prior to the passage of the Voting Rights Act in 1965, black voter registration in Norfolk was proportionately lower than that of whites. In 1960, for example 50% of the white voting age population was registered to vote while only 25.3% of the black voting age population was registered. By October, 1964, black registration had increased to 35% of the black voting age population, while white registration had decreased to 46% of the white voting age population.

Since the passage of the Voting Rights Act in 1965, the black voter registration rate and turnout rate, based on a percentage of the black voting age population, has increased to the point that today it exceeds that of Norfolk's white population. Currently, the black voter registration rate, based on a percentage of the black voting age population, exceeds that of whites, whether one looks at the figures offered by the plaintiffs' experts or at those offered by the defendants' experts. The plaintiffs' figures show a white registration rate of 51.2% of the white voting age population and a black registration rate of 52.9% of the black voting age population under regression analysis. Under the plaintiffs' homogeneous precinct analysis, the white registration rate is 53.1% of the white voting age

population and the black registration rate is 55.3% of the black voting age population.[3]

The black voter turnout rate, based on a percentage of the black voting age population, also currently exceeds that of white voters. The plaintiffs' figures show that the black turnout rate, based upon a percentage of the black voting age population, exceeded the white turnout rate in both the 1982 and 1984 City Council elections. In the May 1, 1984 election, the plaintiffs' figures show that the black turnout rate exceeded the white turnout rate by 11%.[4]

The City has made extensive efforts to increase voter registration and to make the registration process more accessible. According to the City's General Registrar, Ann Washington, as of May 31, 1984, there are twelve satellite voter registration offices located throughout the City of Norfolk. At least seven of these twelve satellite offices are located in or adjacent to predominantly black areas. In addition, the City applied for and received blanket coverage permission from the Department of Justice under Section 5 of the Voting Rights Act to conduct voter registration drives. Such registration drives have been conducted at food stamp distribution centers, the Division of Motor Vehicles, high schools and multiservice centers.

The Court finds that despite an early history of discrimination in Virginia against blacks in terms of their ability to participate in the electoral process, Norfolk's black citizens

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[3] These figures exclude the population on Norfolk's Naval bases or ships home ported in Norfolk. This excluded population is predominantly white and has a low voter registration rate. Inclusion of this military population would result in a white registration rate of 37% of the white voting age population and a black registration rate of 57% of the black voting age population under regression analysis, according to the defendants.

[4] Again, the plaintiffs' figures exclude the predominantly white military population. Inclusion of this population would show a black turnout rate, based on a percentage of the black voting age population, three times higher than that of whites in the 1984 election, according to the defendants.



today participate in the electoral process equally with white citizens. The procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens.

### E. Racial polarization

The plaintiffs and the defendants each offered their own definitions of "racially polarized voting." The plaintifs' expert, Dr. Richard Engstrom, opined that racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group. The defendants' expert, Dr. Timothy G. O'Rourke, suggested that three factors must be examined in order to determine whether racially polarized voting has occurred. First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

The Court rejects the definition of racially polarized voting offered by Dr. Engstrom in favor of that presented by Dr. O'Rourke. Under Dr. Engstrom's definition, most of the elections in this country, including Presidential elections, would be characterized as racially polarized. For example, as Dr. Engstrom conceded, black voters consistently and overwhelmingly support Democratic Presidential cnadidates. In addition, Dr. Engstrom's definition would be more appropriate in a head-to-head race than in an election such as that for the Norfolk City Council in which a voter may select more than one candidate. A vote for one candidate is not necessarily a vote against another candidate.

The Court is of the opinion that the definition offered by Dr. O'Rourke is a more sensible one. It is more applicable to the multiple-candidate, multiple-office Norfolk City Council elections. It is not overly broad, as is Dr. Engstrom's definition. Additionally, it more effectively considers voters' motivations in selecting particular candidates. Furthermore, Dr.

O'Rourke's definition is consistant with the definition adopted by those few courts which have discussed the definition of racially polarized voting. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 904-05 (S.D. Ala. 1982). The Court will therefore employ Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized.

**1. White backlash**

Norfolk's white voters have not turned out in greater numbers than usual in response to the potential election of black candidates. For example, in the 1984 election there were two strong black candidates, Rev. John Foster and Evelyn Butts, yet the percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registgered voters who turned out to vote. As a matter of fact, the 1984 turnout rate for whites, as a percentage of the white voting age population, was lower in 1984 than in any of the three previous elections. The plaintiffs' expert, Dr. Richard Engstrom, conceded that he found no evidence of white backlash.

**2. Voting patterns**

Since the City does not maintain voter registration or turnout figures by race, statistical estimate of voting behavior were used by both the plaintiffs and the defendants. Such statistical estimates are subject to a variety of interpretations and can obviously be manipulated to support the desired result. An additional problem with these statistical estimates is that they are limited to raw numerical data, and in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate.

The plaintiffs rely on two statistical studies, one prepared by Carl Peterson and Kimball Brace ("the Brace report")[5] and one

[5] In referring to the Brace report, the Court refers to the third and final study prepared by Peterson and Brace, Plaintiffs' Exhibit 50-B.



prepared by Dr. Richard Engstrom, to prove that voting in Norfolk City Council elections is racially polarized. These two statistical analyses employed data consisting of the number of registered voters in each precinct, the number of votes cast for each candidate in each precinct, and the racial composition of each of the City's 54 precincts, as determined from the 1980 Census maps. Neither of the plaintiffs' experts' studies considers factors other than race which may greatly influence voting behavior. These factors include a voter's age, ethnicity, education and income. Other factors which may influence voting behavior include incumbency, campaign expenditures, endorsements and name recognition. None of these factors were considered in the Brace report or Dr. Engstrom's report.

That these factors are relevant becomes clear if one examines, for example, the effect of incumbency on City Council elections. An examination of the elections from 1968 through 1984 shows tha the incumbency success rate is over 79%. In four of the nine elections, every incumbent who sought reelection was reelected. Since 1974, every black incumbent who has sought reelection has been reelected. There is a high correlation between incumbency and election to the City Council. Yet, the plaintiffs, while admitting that incumbency plays a role in City Council elections, failed to adjust their figures to account for this factor.

Without going into great detail, the Court is convinced that the Brace report and Dr. Engstrom's report contain a number of methodological problems which cause the Court to doubt the credibility of the reports. Primary among these are the exclusion from both the Brace and Engstrom reports of those residing on Naval bases within the City limits or stationed aboard ships home ported in Norfolk. These individuals are eligible to register to vote in Norfolk City Council elections. This military population is included in the 1980 Census figures for Norfolk, and was included by the General Assembly of Virginia in the drawing of district lines for the election of the members of the Virginia Senate and House of Delegates, the State legislative bodies.

The plaintiffs' experts' reason for excluding this military population is that they are largely unregistered to vote and do not participate in City Council elections. Yet, the plaintiffs inexplicably included the City's student population, despite the fact that students also tend to be inactive members of the electorate. In addition, the plaintiffs' experts included in their studies the over 11,000 military personnel living off the Naval bases in private homes in the City.

The Court is convinced that this military population was excluded because of the effect of its exclusion on estimates of white voter participation. The racial composition of this excluded population is 84.5% white and 15.5% black, according to the 1980 Census data. Of the 33,892 members of the excluded military population who are of voting age, 84.3% are white and 15.7% are black. Exclusion of this population would have the effect of increasing white voter registration and turnout figures and, consequently, of decreasing black voter participation figures, as Dr. Brace conceded. The Court is of the opinion that the exclusion of these 33,892 potential voters in the plaintiffs' experts' studies improperly skews the results of their studies.

A second methodological problem with the plaintiffs' experts' reports was their inclusion of the so-called "other population" in with the figures for the white population when preparing and analyzing the data. This "other" population, amounting to between three and four percent of Norfolk's population, includes Asians, Native Americans and others. In other words, the plaintiffs' experts included all non-blacks in their definition of whites. The plaintiffs' experts' reports purport to compare white and black voting behavior, yet they include non-white voters within the white category. This results in an increase in the number of white registered voters and in the white voter turnout in comparison to that of black voters.

The defendants relied on the testimony of Dr. Timothy G. O'Rourke and Dr. Justin G. Green to support their contention that voting in Norfolk City Council elections is not racially



polarized. Dr. O'Rourke, in contrast to the plaintiffs' experts, considered such factors as endorsements and campaign expenses in reaching his conclusions. Drs. O'Rourke and Green avoided the methodological problems which the Court believes the plaintiffs' experts' studies suffer from. They did not exclude the military population from their analyses, nor did they include the "other" population in their studies. In addition, they went beyond the election figures, and studied newspaper articles and other data in reaching their conclusions. The Court attaches greater weight to the analyses of the defendants' experts Drs. O'Rourke and Greeen than to the studies of the plaintiffs' experts Dr. Engstrom, Brace and Peterson, finding them to be more credible and persuasive.

The Court's review of these studies and analyses leads it to conclude that the voting patterns reveal a substantial crossover vote. For example, in the 1978 election, 32.2% of the white voters supported Rev. Joseph N. Green, Jr. in his first election. In 1982, Rev. Green received the support of 31.1% of the white electorate. In 1984, Rev. John Foster was supported by 26.6% of the white voters. These figures show a willingness by white voters to cross racial lines when voting in City Council elections. The Court also notes that a substantial number of black voters have shown a willingness to vote for white candidates, particularly in the elections of Elizabeth Howell, in 1974, 1978 and 1980, in which she received the support of a majority of black voters.

Further study of the election results reveals the importance of coalition politics in Norfolk City Council elections. Both plaintiffs' and defendants' experts agree that none of the three winning candidates in 1984 would have been elected without the support they received from both black and white voters.

The Court's review of the studies also shows that a number of unsuccessful black candidates failed to receive the support of even a majority of black voters. For example, in 1984, two black candidates, Theodore Hall and Joseph Rose, received only 8.9% and 18.7% of the votes case by blacks, respectively.

In 1982, black candidates Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were supported by only 27.5% and 29.16% of the black voters, respectively. In the 1980 election, George H. Banks, a plaintiff in this lawsuit, received only 34.5% of the votes cast by black voters. Another of the plaintiffs in this action, Dr. Milton A. Reid, received the support of only 36.4% of the blacks voting in the 1974 election. These black candidates were obviously not the candidates of choice of the black voters in those elections.

Between 1974 and 1984 there have been sixteen black candidates for the Norfolk City Council. Four of those candidates have been elected. Eignt of the remaining black candidates failed to receive the support of even a majority of the black electorate. The remaining four black candidates are actually only two individuals: Evelyn T. Butts in 1980, 1982 and 1984, and Lenious G. Bond in 1972. Mrs. Butts would most likely have been elected in 1984 had she received the same level of black support she received in her earlier races, which dropped from a high of 92.9% in 1980 to 72.1% in 1984.

The Court also finds, as the parties agree, that the current rate of black voter registration and turnout is proportionately higher than that of the white population. One would expect the opposite to be true under a racially polarized voting system with a majority of white voters. After thoroughly reviewing the voting behavior studies presented by the plaintiffs and defendants, the Court finds that the voting patterns in Norfolk City Council elections do not reflect racial polarization.

#### 3. Efforts to limit the field of candidates

The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available. In the most recent election, held May 1, 1984, ten candidates sought to fill three seats on the Council. For the elections which were held from 1968 thrugh 1984, the average number of candidates per election was thirteen.

The evidence fails to disclose any effort on the part of whites to limit the field of candidates and the statistics support this



conclusion. There was no evidence offered to suggest that any individual who desired to seek a position on the City Council was prevented or even dissuaded from doing so.

#### 4. Summary

In summary, the Court finds no evidence of white backlash. The Court further finds that a thorough examination of the voting behavior of Norfolk's black and white voters fails to reveal a racially polarized electorate. Finally, the Court finds no evidence of efforts by whites to limit the field of candidates. Applying Dr. O'Rourke's definition of racially polarized voting, the Court concludes that voting in Norfolk City Council elections is not racially polarized.

### F. Enhancing factors

#### 1. Existence of unusually large election districts

Under the at-large system, the election district obviously consists of the entire fifty-three square mile City. The Court is not convinced, however, that the size of the election district, that is of the City, enhances the opportunity for discrimination against black residents. Although the plaintiffs allege that it would be easier and less costly to run for the City Council under a ward system, they presented no statistical evidence to support his contention. It is conceivable that there would be no decrease in the cost of running for City Council under a ward system because head-to-head competition may in fact cause costs to escalate.

#### 2. Majority vote requirements

There is no majority vote requirement in Norfolk City Council elections. Council members are elected by a plurality of the votes cast, regardless of whether they have received a majority of the votes cast. In fact, in every City Council election from 1968 through 1984, the candidate with the lowest total vote of those elected has received less than 50% of the vote. Four of those candidates with the lowest winning total received less than 45% of the votes cast.

### 3. Anti-single-shot provisions

There are no prohibitions against casting single-shot ballots in Norfolk City Council elections. In fact, the evidence shows that black voters have on occasion successfully employed single-shot tactics.

### 4. Staggered terms

The members of the Norfolk City Council serve staggered four-year terms. Generally, four seats are filed in one election and three seats are filled in the following election. In two of the nine elections held since 1968, however, more than four seats were up for election. Six seats were available in 1970 and five seats were available in 1978, due to vacancies on the Council.

The plaintiffs allege that staggered terms increase the likelihood of head-to-head racial contest, and minimize the effect of single-shot voting. If, as the plaintiffs allege, staggered terms have a discriminatory effect upon Norfolk's City Council elections, it would be expected that in those years in which the fewest seats were up for election blacks would be unsuccessful in seeking office. To the contrary, in four of the five elections held since 1968 in which three seats were available a black has been elected, that is, Joseph Jordan in 1968, 1972, and 1976, and Rev. John Foster in 1984.

Furthermore, the plaintiffs' allegation with regard to head-to-head contests is not supported by the evidence. The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen. The large field of candidates in Norfolk City Council elections minimizes the likelihood of head-to-head contests.

### 5. Numbered post or residency requirements

There are no numbered post or residency requirements governing Norfolk City Council elections. A numbered post



requirement, which would require candidates to seek particular seats on council, would create head-to-head contests, which the plaintiffs find objectionable. A residency requirement, which would in effect be equivalent to a numbered post requirement, similarly would encourage head-to-head contests.

### 6. Summary

In summary, the Court finds that the City has not used any of the enumerated voting practices or procedures to discriminate against black voters.

## G. Candidate slating

Defense witness Dr. Timothy J. O'Rourke, a University of Virginia political scientist, defined a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for office. Having recruited them, [it] puts them up as a slate for as many seats as are open, and organizes a campaign and promotes those candidates in a campaign as a slate." (Tr. 1961-62). As an example of slating groups, Dr. O'Rourke cited political party organizations. (Tr. 1962). The Court adopts the definition of a slating group offered by the defendants.

The plaintiffs allege that an all-white group of businessmen, referred to as the "westside businessmen's coalition" during the trial, has twice run a slate of all-white candidates and that no blacks were ever asked by the members of the group to run on its slate. The plaintiffs refer to the 1976 election in which Vincent J. Thomas and G. Conoly Phillips ran for election together and the 1980 election in which Thomas and Phillips ran with Joseph A. Leafe.

The plaintiffs implied throughout the trial that this "westside businessmen's coalition" has sufficient influence to determine who will be elected to the City Council. The plaintiffs offered no evidence, other than the testimony of the plaintiffs themselves, that this "westside businessmen's coalition" is a

slating organization and the Court finds that this group does not constitute a slating organization as defined by Dr. O'Rourke. When Thomas and Phillips ran together in 1976, although there were three seats up for election, the two candidates did not ask a third candidate to run with them. A slate, as defined by Dr. O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate. While Phillips and Thomas may have been asked to run by individual members of the business community, there is not evidence that they were recruited to run by a slating organization.

With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate. Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses. The plaintiffs' theory, that this so-called "westside businessmen's coalition" is controlling the Norfolk City Council elections, is not supported by credible evidence.

The only possible example of slating by an organizaton in Norfolk City Council elections, as established by the evidence, occurred in 1982, when the City Democratic Committee endorsed a biracial slate of two black and two white candidates. The two black candidates who were members of that slate were



Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs in this action. All four of the candidates who ran on the Democratic Committee slate failed to win election.

Both the plaintiffs and defendants agree that the Concerned Citizens of Norfolk, a black political organization, has endorsed both black and white candidates for Council, but that the group is not a slating organization because it neither recruits candidates for office nor runs the endorsed candidates on a slate.

In summary, the Court finds that the only possible candidate slating by an organization which has occurred in Norfolk City Council elections occurred in 1982, when the City Democratic Committee endorsed biracial slate of candidates. The Court further finds that the plaintiffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process.

### H. Socio-economic Disparities

#### 1. Education

According to the 1980 Census, the percentage of adult blacks (25 years or older) in Norfolk with no more than an elementary school education is 31.15%, a drop of 16.18% from the figure reported in the 1970 Census. The percentage of adult blacks in Norfolk with less than four years of high school education is 55.3%, according to the 1980 Census, a drop of 18% from the 1970 figure. By way of comparison, 1980 Census figures show that 12.0% of Norfolk's adult whites have only an elementary school education, and that 29.8% of the adult white population has less than four years of high school education. Of the total adult population with four or more years of college, blacks comprised 16.48% and whites 72.2%. The 1970 figure for blacks was 12.95%, showing an increase in the number of college educated blacks.

#### 2. Income

According to the 1980 Census statistics, 35.46% of all black persons residing in Norfolk have incomes below the poverty

level, compared to 11.5% of all white persons. This figure reflects a drop of almost 4% from 1970 for black persons. The 1980 Census figures also show that the median income for Norfolk's whites is $17,548, while the median income for Norfolk's blacks is $10,258.

### 3. Housing

According to the 1980 Census, over 10% of all housing units occupied by blacks have more than one person per room, as compared with less than 2% of white-occupied households. The 1970 Census figures reflect a decrease in black households having more than one person per room of over 8% over the last decade. The 1980 Census figures also reflect that the median value of white owner-occupied households exceeds that of black owner-occupied households by $11,100.

### 4. Employment

The 1980 unemployment rate for blacks (11.9%) is more than twice that of whites (5.3%).

### 5. Health

The plaintiffs assert that the 1982 infant mortality rate and 1982 rate of new cases of tuberculosis in Norfolk were higher for blacks than for whites. The Court is unable to verify these figures because the plaintiffs did not indicate the source of their figures.

### 6. Effect of socio-economic disparities

Despite the disparities between the black and white citizens of Norfolk in the areas of education, employment, housing and income, the voter participation figures show that they have not hindered the participation of Norfolk's blacks in the electoral process. Blacks are registering to vote and turning out to vote at rates equal to or greater than the rate for whites, based on a percentage of the voting age population.



One longtime observer and participant in Norfolk politics, Judge Joseph A. Jordan, Jr., a black former City Council member testified that the failure of blacks to vote in Norfolk elections cannot be blamed on the economic status of blacks. He places the blame, at least in part, on the black leadership's failure to continue efforts begin in the 1950's aimed at achieving total black suffrage in Norfolk, and which were subsequently discontinued by the blacks. (Tr. 1521-23).

The Court is pleased to note that the position of Norfolk's black residents has improved in the areas of education, housing and employment in recent years. This may well be in some part due to their continued and increasing participation in the political process.

### I. Racial Appeals

The plaintiffs point out only one City Council campaign that they contend was characterized by appeals to the racial prejudices of white voters. The plaintiffs allege, and their expert Dr. Jerry Himelstein, a sociologist, testified, that the 1982 campaign was characterized by subtle and overt racial appeals. Dr. Himelstein's conclusion was based solely on a study of newspaper accounts of the 1982 campaign during the four months preceding the election. He testified that the two dominant themes which emerged were public school busing as a racial issue and the issue of black representation on the City Council.

Dr. Himelstein testified that his opinion that the school busing issue constituted a racial appeal was confirmed by an examination of the Brace report's 1982 election statistics and by a letter from former Lieutenant Governor Henry E. Howell, Jr. to then Mayor Vincent Thomas, which appeared in *The Virginian-Pilot*. Dr. Himelstein suggested that the issue of busing effected the outcome of the election because the three white candidates who were elected, Dr. Mason C. Andrews, Claude J. Staylor, Jr. and Robert E. Summers, all opposed busing. The Court believes, however, that the election of these three candidates can as easily be attributed to their in-

cumbency, and that Dr. Himelstein's suggestion that they were elected because of their opposition to busing is unsubstantiated.

Dr. Himelstein's other so-called confirmation of his analysis, the Howell letter to Thomas, is equally lacking in validity. Howell testified that his letter, in which he urged Thomas to reconsider his opposition to busing, "didn't have anything to do with the campaign." (Tr. 1584). Howell further testified that he never heard any discussions of busing by candidates during the 1982 election that he would characterize as racial appeals.

The Court concludes from the evidence that the issue of public school busing was a legitimate public concern and not an appeal to racial prejudices. Both black and white candidates addressed the issue of busing during the 1982 campaign, although many of the candidates spoke to the issue reluctantly and often only when questioned by the public about their stance on the issue. The evidence fails to show that any of the candidates intended to, or did in fact, use the issue to appeal to the racial prejudice of voters.

Dr. Himelstein also testified that news accounts of the 1982 campaign frequently discussed the race of the candidates and raised the issue of black representation on the Council. It appears to the Court, from reading the newspaper accounts, that this issue was one raised by the black candidates. There was no evidence that this issue constituted an appeal to the racial prejudice of voters.

The Court concludes that the evidence fails to show that the 1982 campaign was characterized by subtle or overt racial appeals. In fact, Rev. Joseph N. Green, Jr., a black member of the Council, was reelected in the 1982 election with the support of over 30% of the white voters. The statistics indicate that Rev. Green received approximately the same support from white voters in 1982 as he received in the 1978 election, indicating no withdrawal of white support from Rev. Green, who favored school busing. The plaintiffs do not suggest that racial appeals were made in any other City Council election.



**J. Election of blacks to public office**

Blacks currently hold elective positions on the Norfolk City Council, in Norfolk's delegation to the Virginia House of Delegates, and as the sheriff of the City of Norfolk. Two blacks, Revs. Joseph N. Green, Jr. and John Foster, currently serve on the seven-member City Council. Two blacks, William P. Robinson, Jr. and Dr. Yvonne Miller, are members of Norfolk's five-member delegation to the Virginia House of Delegates. The sheriff of the City of Norfolk is David Mapp, a black.

Since at-large elections were instituted in 1918, three blacks have been elected to membership on the Norfolk City Council. At least one black has served on the Council continuously since 1968. Joseph A. Jordan, Jr., a black, was first elected to the City Council in 1968 and was reelected in 1972 and 1976. He served as vice mayor during his last two terms a position to which he was elected by the members of the Council. Following Jordan's appointment to a judicial position in 1977, Rev. Joseph N. Green, Jr., a black, was appointed to fill Judge Jordan's unexpired term. Rev. Green was elected to the Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. Rev. John Foster, a black, was elected to the City Council on May 1, 1984.

As a result of Rev. Foster's election, two blacks, Revs. Green and Foster, will serve on the seven-member Council through June 30, 1986. The plaintiffs insinuated throughout the trial that the election of Rev. Foster to the Council, which occurred after the filing of this lawsuit, was an attempt by unnamed white city officials and other community leaders to moot this action. The plaintiffs point to former Mayor Vincent Thomas' decision to forgo seeking reelection in 1984, and suggest that his decision was part of this alleged conspiracy. Mayor Thomas stated that he decided not to seek reelection in 1984 for personal reasons. He further stated that his support for the election of a second black to Council predated the filing of this action and the Court is not persuaded to the contrary by the plaintiffs' innuendo. There is no evidence that the election

of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action.

Norfolk's delegation to the Virginia House of Delegates has included at least one black member since 1969, when William P. Robinson, Sr. was first elected. Robinson, Sr. served in the House of Delegates until his death in 1981. Following his death, his son, William P. Robinson, Jr., was elected a member of Norfolk's delegation to the House of Delegates and he remains a member, having been reelected in 1983. In 1982, Norfolk was divided into single-member districts for the election of members of the House of Delegates, those elections having previously been conducted at-large. In the 1982 special election, the first conducted under the single-member districts plan, Robert Washington, a white, defeated William Swindell, a black and a plaintiff in this lawsuit, in a head-to-head race to represent the newly created 89th District, a predominately black district. In 1983, Delegate Washington declined to seek reelection, and Dr. Yvonne Miller, a black, ran unopposed for election to the House of Delegates from the 89th District. Consequently, two of the five current members of Norfolk's delegation to the Virginia House of Delegates are black, Delegates Miller and Robinson.

David Mapp became the first black elected to a constitutional office in Norfolk when he was elected sheriff in 1981. In the primary election, Sheriff Mapp defeated a white challenger in a head-to-head contest. In the general election he overwhelmingly defeated three white candidates. Sheriff Mapp received the endorsements of the outgoing sheriff, a white, and the Democratic party.

### K. Responsiveness

#### 1. Appointments to boards and commissions

The plaintiffs contend, and their expert Dr. Loren Solnick, a labor economist, testified, that black residents are underrepresented on Norfolk's appointive boards and commissions. The parties have stipulated to the racial composition of the 58



boards, commissions and authorities appointed in whole or in part by the Norfolk City Council. Of the 438 appointive positions, 344, or 78.54%, are filled by white residents and 94, or 21.46%, are filled by black residents. Seventeen of the boards and commissions are all-white, including the Granby Mall Advisory Commission, the Municipal Bond Commission, the Police-Fire Trial Board, and the Tidewater Community College Board. One of the boards, the Southeastern Tidewater Opportunity Project Board of Dirctors, is all-black. Two of the boards and commissions have a majority black membership and an additional two have an equal number of black and white members.

These figures, taken alone, would suggest, as Dr. Solnick testified his study shows, that blacks are indeed underrepresented on the City's appointive boards and commissions, considering that blacks constitute 31.48% of Norfolk's voting age population and only 21.46% of the appointive positions are held by blacks. The defendants presented evidence, however, in the form of City ordinances, which shows that in order for a citizen to serve on certain boards and commissions he or she may be required to meet certain criteria. Such criteria include special knowledge, experience, training or education in the relevant field.

In addition, some of the members of certain commissions and boards are required to be representatives of particular groups or sectors of the community. For example, City Code Section 31.47 provides that the five members of the Granby Mall Advisory Commission shall consist of: one representative of the Norfolk Redevelopment and Housing Authority, one representative of the Downtown Norfolk Association, one representative of the Norfolk Chamber of Commerce, one representative of the Retail Merchants Association, and one representative of downtown business interests. Over seventy-five of the seats on boards and commissions carry with them special qualifications as contained in the City ordinances.

The plaintiffs' expert, Dr. Solnick, assumed in his study that every person in the voting age population is eligible to serve on

the boards or commissions. This is obviously a flawed assumption, as demonstrated by the evidence offered by the defendants. When confronted with the defendants' evidence, Dr. Solnick admitted tht he failed to consider these special requirements in his study. The plaintiffs failed to respond with any more accurate figures, which would take into account the special qualifications needed to serve on many of the boards and commissions, despite having the opportunity to do so on rebuttal. The plaintiffs having failed to present an accurate study upon which the Court could base an evaluation, the Court is unble to find that the City has failed to appoint blacks to boards and commissions in proportion to their representation in the voting age population of the City. The Court notes, however, that blacks are well-represented on the more important boards and commissions, such as the School Board, the Norfolk Redevelopment and Housing Authority Board of Commissioners, the City Planning Commission, and the Civil Service Commission.

**2. City employment**

The plaintiffs contend, and their expert Dr. Loren Solnick testified, that his study shows that blacks are under represented in City government supervisory positions, as well as in the Norfolk Police and Fire Departments. The parties have stipulated that as a percentage of total municipal employment, blacks comprised 36.16% of the municipal work force in 1973 and 41.31% of the work force in 1983. According to the City's 1983 EEO-4 report, as amended, the percentage of black city employees in each of the following job categories was:

| | |
|---|---|
| Officials/Administrators | 5.5% |
| Protective Services | 10.02% |
| Professionals | 31.77% |
| Paraprofessionals | 60.28% |
| Technicians | 23.11% |
| Office/Clerical | 39.48% |
| Skilled Craft Workers | 42.11% |
| Service Maintenance | 81.74% |



In Dr. Solnick's study he compared the City's employment of blacks in these eight occupational categories with the 1980 Census data for the Norfolk SMSA, specifically the employment of blacks and whites in comparable occupational groups. The plaintiffs allege, based on Dr. Solnick's study, that blacks are particularly underrepresented in the officials/administrators and protective services categories. The plaintiffs' study found no underrepresentation of city employees in the remaining six categories: professionals, parpaprofessionals, technicians, office/clerical, skilled craft workers and service maintenance.

With regard to officials and administrators, Dr. Solnick's comparison included figures from the 1980 SMSA Census tables for public officials and administrators at the federal, state and local levels. The Court agrees with the defendants that the more appropriate comparative group would be limited to officials and administrators employed at the local level. Using that group as the comparison, the difference between the City's black officials and administrators (5.5%) and the figure drawn from the Census tables (6.5%) is insignificant.

With regard to protective services employees, a category which in the City of Norfolk is limited to police and firefighters, the Court points out that the City's hiring in the Police and Fire Departments has been controlled by a consent decree entered by another Judge of this Court in the case of *United States* v. *City of Norfolk*, Civil Action No. 78-418-N (E.D. Va. Aug. 28, 1978). The evidence shows efforts by the City to recruit black applicants for positions in the Police and Fire Departmens. In addition, the percentage of blacks in the City's Police and Fire Departments does not differ significantly from the 1980 SMSA Census figures for blacks employed in police and firefighting occupations.

The Court notes that the plaintiffs did not present any evidence of qualified black applicants being turned down for City employment.

### 3. Libraries

The parties have stipulated that both in terms of location of libaries and programs offered, the Norfolk City Libraries Department does not discriminate against black citizens and is responsive to the needs of black citizens.

### 4. Fire department services

The parties have stipulated that both in terms of locations of fire stations and responses to fire alarms, the Norfolk Fire Department does not discriminate against Norfolk's black citizens and is responsive to the needs of black citizens.

### 5. Police department services

The plaintiffs offered little evidence of discrimination by the Norfolk Police Department against black citizens. The Court finds on the basis of the evidence offered by the defendants that the Police Department has undertaken a series of community relations efforts designed to improve its relations with the black community. These efforts include the establishment of a Police Community Relations Unit, the maintenance of storefront operations in black neighborhoods, and the creation of the Block Security and Comprehensive Crime Prevention programs. The Court further finds that the Police Department is responsive to the needs of black citizens.

### 6. Social services

The parties have stipulated that in terms of location of facilities and services provided, the Norfolk Department of Human Resources does not discriminate against black citizens and is responsive to the needs of Norfolk's black citizens. The defendants' evidence shows that the City offers a variety of social service and public assistance programs which have primarily benefitted black residents.

### 7. Health services

The plaintiffs offered no evidence that the Norfolk Department of Health discriminates against black citizens or is unresponsive to their needs. The Court finds, on the basis of the evidence offered by the defendants, that the City offers numerous health programs which have primarily benefitted black residents.



### 8. Parks and recreation

The plaintiffs offered no evidence that the Department of Parks and Recreation is unresponsive to the needs of black citizens. The evidence offered by the defendants shows that City's recreational facilities and services are utilized by black residents at a greater rate than that of white residents.

### 9. Cemeteries

The plaintiffs offered no evidence that the City's cemeteries are operated in a discriminatory manner, and the Court finds that the defendants have demonstrated that the City's eight cemeteries are operated on a nondiscriminatory basis.

### 10. Education

The plaintiffs attempted on several occasions to raise the issue of public school busing in this case. The Court declined to permit them to do so. The Court refers the parties to Judge MacKenzie's opinion in *Riddick* v. *School Board of City of Norfolk*, Civil No. 83-326-N (E.D. Va. July 9, 1984). The plaintiffs have failed to establish any discrimination against black students in the Norfolk public school system. In fact, the Superintendent of Schools is black.

### 11. Public works and utilities

The plaintiffs presented little evidence of a lack of responsiveness by the Department of Public Works to the needs of black residents. The Court finds on the basis of the evidence offered by the defendants that the Department of Public Works provides street lighting, paved roads, drainage, solid waste removal and street cleaning to all parts of the City on a nondiscriminatory basis and is responsive to the needs of black residents. The plaintiffs offered no evidence that the

Department of Public Utilities discriminates in its provision of water and sewer services to the City's residents, and the Court finds no such discrimination.

The Court finds that since 1970, the City has expended millions of dollars on capital improvement projects in predominantly black neighborhoods. The parties agree that from 1970 through September, 1983, the City of Norfolk spent over $9.3 million in Berkley, a predominantly black-occupied area of Norfolk, and allocated an additional $3.5 million to be spent. The funds were spent on capital projects including street repairs, a senior citizen center, branch library replacement, fire station replacement and neighborhood facilities program. Of the funds already spent, approximatley $6.5 million was federally funded and $2.5 million was locally funded. Of the funds yet to be spent, $.5 million will be federally funded and $3 million will be locally funded.

The parties also agree that from 1969 through October, 1983, the City has spent over $19 million in the Church Street/Huntersville area, another predominantly black-occupied area of Norfolk, with an additional $4.9 million allocated to be spent. The funds were spent on capital improvement projects including street repairs, cemetery repairs, day care center acquisition, and rehabilitation to Young Park, a subsidized housing project. Of the over $19 million already spent, $17.5 million was federally funded and $1.7 million was locally funded. Of the $4.9 million yet to be spent, $4.8 million will be federally funded and $1 million will be locally funded.

**12. Housing**

**a. Code enforcement**

The plaintiffs presented no evidence of discriminatory enforcement of the City Housing Code by the Department of Community Improvement or the Division of Housing Services. The Court is persuaded by the evidence offered by the defendants that the Department of Community Improvement and the Division of Housing are responsive to the needs of black residents, and that many of the programs offered are designed to benefit the City's black citizens.



**b. Urban redevelopment**

The plaintiffs contend that the Norfolk Redevelopment and Housing Authority (NRHA) has not been responsive to the needs of black residents. The NRHA was established by the City in 1940, pursuant to State enabling legislation. The Norfolk City Council appoints the NRHA Board of Commissioners. The plaintiffs point out, and the defendants concede, that of the 21 commissioners who have served on the NRHA since 1940, only three have been black. Two of the five current commissioners, however, are black. The NRHA's main functions are the prevention and removal of slums and blight and the provision of low- and moderate-income housing in Norfolk.

The plaintiffs have alleged that the NRHA has not replaced low-income housing which was demolished through slum clearance programs with other low-income housing on a one-to-one basis. David H. Rice, executive director of the NRHA, testified that this allegation is factually incorrect, and that in fact, the number of low-income housing units which were made available exceeds the number of low-income units which were demolished. According to NRHA figures, during the period from 1950 to the date of trial, the NRHA was responsible for the demolition of 10,900 low-income housing units as part of its slum clearance and urban renewal efforts. During the same time period, NRHA figures indicate that the NRHA was responsible for the production of 9,615 new low-income housing units, made available an additional 552 units under a federally subsidized housing program known as "Section 8," and rehabilitated 74 units using Section 8 funds. In addition, the NRHA, under its own conservation program, rehabilitated another 3,000 units by improving their condition from "substandard" to "standard." Totaling these figures it appears that the NRHA has made available for occupancy 13,241 low-income housing units during the period from 1950 to the date of trial, over 2,300 more than were demolished during the same period.

These figures, which the Court finds to be credible, rebut the plaintiffs' allegation that the NRHA has not replaced low-income housing on a one-to-one basis. The Court further finds that all persons displaced by NRHA programs are required by NRHA procedures to be relocated into "decent, safe and sanitary housing," and that these procedures have been complied with. (Tr, 1739, 1741).

**c. East Ghent**

The plaintiffs rely upon the redevelopment of East Ghent to bolster their claim that the NRHA's policies and programs are racially discriminatory. Both parties agree that prior to redevelopment, East Ghent was a severely run-down predominantly black neighborhood. According to NRHA executive director Rice, approximately 1,800 families, almost all of whom were black, were relocated as a result of the East Ghent redevelopment project. The plaintiffs contend that those who were relocated were given indications that they would be able to return to East Ghent when redevelopment was completed. Mr. Rice concedes that in the early stages of the redevelopment project, indications were made that the NRHA would include some subsidized housing in its plans for East Ghent.

A 150-unit federally subsidized housing project for the elderly was the first housing built in Eash Ghent. In 1974, the NRHA Board of Commissioners made a decision not to locate any additional low-income housing projects in East Ghent. This decision was based upon a desire to attract middle-income families back into the City's downtown area to provide a much needed tax base. Other considerations included the fact that the federal programs that provided subsidies for privately owned housing had been halted in 1974. The City Council approved the NRHA's application to rezone the East Ghent area from R-4 (Multiple Residence District), R-5 (Multiple Residence District), C-1 (Neighborhood Commercial District), C-3 (General Commercial District) and M-1 (Limited Manufacturing District) to PD-H. (Planned Development District—



Housing) on November 5, 1974 by a 6-1 vote. According to Carroll A. Mason, who was then Area Director of the United States Department of Housing and Urban Development, HUD agreed with the City's assessment of the need to broaden its tax base.

The Court concludes that the NRHA's decision to promote middle-income housing in East Ghent was not racially motivated, but rather was motivated by a genuine desire to broaden the City's downtown tax base. In addition, the Court finds that the NRHA's decision was consistent with the City's efforts to revitalize its downtown area.

**d. Community development block grant programs**

Since the mid-1970's, the City has participated in Community Development Block Grant (CDBG) programs administered by the United States Department of Housing and Urban Development (HUD). The CDBG program provides federal funds for such purposes as programs benefitting low- and moderate-income persons. During the years of its participation in the CDBG programs, the City has received nearly $100 million in federal funds.

The plaintiffs have alleged that the NRHA has repeatedly violated federal statutes and regulations with regard to achieving racial balance in public housing projects. The defendants contend that the City's funds have never been reduced, delayed, suspended, or disapproved by the Federal government for any reason, including any violation of federal statutes or HUD regulations. The Court has thoroughly reviewed the testimony and the documentary evidence on both sides. The Court accepts as credible the testimony of past and present NRHA officials that they have had little success in their attempts to achieve racial balance in the City's public housing projects because: (1) HUD regulations require that preference for placement in projects be given to those who have been displaced, and those Norfolk residents who have been displaced are overwhelmingly black; (2) HUD prohibits the use of

quotas or preferential treatment on the basis of race to ensure racial balance; and (3) those who seek public housing in Norfolk are predominantly black. The NRHA officials' testimony is supported by the testimony of Carroll Mason, former Area Manager of HUD. The Court finds that it would be impossible for the City to achieve racial balance in its housing projects when it does not have enough white applicants to achieve that goal.

#### e. Racial integration of neighborhoods

The plaintiffs allege that the City of Norfolk is racially segregated, in large part due to the NRHA's placement of public housing projects in predominantly black neighborhoods. The defendants contend that this is not so, citing the testimony of urban demographer Dr. William A. Clark that Norfolk is "a reasonably well integrated city." (*Riddick*, Tr. 3069). The defendants further rely on Dr. Clark's studies to show that even a random allocation of the City's public housing projects would have had only a minor impact on the racial makeup of the City's neighborhoods. The Court finds no evidence to the contrary and therefore concludes that the plaintiffs have failed to substantiate this claim.

### 13. Summary

The Court finds evidence of substantial black-employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black occupied areas, and a nondiscriminatory provision of essential city services and capital improvements to black residential neighborhoods.

### L. Tenuousness of policies supporting at-large elections

The plaintiffs suggest that the use of an at-large election system in Norfolk is pursuant to a tenuous policy. The Court finds, to the contrary, that the policy is by no means tenuous.

As defendants' expert, Dr. Timothy J. O'Rourke, testified, the city manager-council form of government is associated



with the at-large election system throughout the nation. According to a 1981 survey, of the cities nationwide with populations of between 250,000 and 500,000 which have council-manager forms of government, over 75% have at-large elections for council.

All of Virginia's forty-one cities have the council-manager form of government. Only six of those cities do not have at-large elections for council. The cities of Petersburg, Richmond and Lynchburg abandoned at-large elections after Justice Department objections to proposed annexations under Section 5 of the Voting Rights Act. Suffolk's abandonment of the at-large system dates to a city-county consolidation. Hopewell abandoned at-large elections in settlement of a Section 2 action. Winchester, Lynchburg and Hopewell have adopted systems in which some council members are elected from wards and some at-large. The remaining thirty-five Virginia cities have at-large elections.

The Court concludes that Norfolk's policy of at-large City Council elections is consistent with both national and State practices for cities with the council-manager form of government. The Court finds no evidence that Norfolk's at-large election system is the product of a tenuous policy.

### M. Black participation in the electoral process in Norfolk

The extent of black participation in Norfolk's elections is best illustrated by an examination of the role which the Concerned Citizens of Norfolk, a black political organization, has played, as well as an examination of the participation of blacks in the City Democratic Party.

### 1. The Concerned Citizens of Norfolk

Founded in the 1960's, the Concerned Citizens has become the most influential black political organization in Norfolk. The original co-directors of the group were Joseph A. Jordan, Jr. and Dr. William P. Robinson, Sr., both black residents of Norfolk. Dr. Robinson served as a member of the City's dele-

gation to the Virginia House of Delegates from 1969 until his death in 1981. Joseph A. Jordan, Jr. served on the City Council from 1968 until 1977 and served as vice mayor from 1972 to 1976. He was appointed to a judgeship on the General District Court in 1977. Both were elected repeatedly in at-large elections. Today, the co-directors of the Concerned Citizens are William P. Robinson, Jr., a member of Norfolk's delegation to the Virginia House of Delegates since 1981, and Mrs. Evelyn T. Butts, who has unsuccessfully sought a seat on the City Council three times.

Prior to each election in Norfolk, a committee of the Concerned Citizens interviews the candidates who are seeking the organization's endorsement. The group's endorsements are presented primarily through the issuance of the Goldenrod guide ballot, which lists the names of the endorsed candidates. The guide ballot is widely distributed on election day.

The effectiveness of the Concerned Citizens' endorsements in garnering the votes of black citizens for the endorsed candidates can be seen from a review of several City Council elections. In 1974, for example, the Concerned Citizens endorsed two white candidates, Elizabeth Howell, wife of former Lieutenant Governor Henry E. Howell, Jr., and Claude J. Staylor, Jr., former Norfolk Chief of Police. The organization also endorsed a black candidate, Lenious G. Bond. Three other black candidates were amongst the field of twenty-one candidates, including Dr. Milton A. Reid, a plaintiff in this action. Dr. Reid sought, but did not receive, the Concerned Citizens' endorsement. Mrs. Howell received over 58% of the black vote[6] and Mr. Staylor received over 56% of the black vote and both were elected. Mr. Bond received 73% of the black vote, while Dr. Reid received only 36% of the black vote.

In 1980, the Concerned Citizens again endorsed Mrs. Howell. The organization also endorsed one black candidate,

[6] The figures in this section are all based on homogeneous precinct analysis.



Mrs. Evelyn T. Butts, the co-director of the group. The only other black candidate in the field of twelve was George H. Banks, a plaintiff in this lawsuit. Mr. Banks was not endorsed by the Concerned Citizens, and received only 34.5% of the black vote. The endorsed candidates, Mrs. Howell and Mrs. Butts, received 72.9% and 92.9% of the black vote, respectively.

In the 1982 election, there were four black candidates in the field of fourteen. The Concerned Citizens endorsed two of the black candidates, Rev. Joseph N. Green, Jr. and Mrs. Butts. The two other black candidates, Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were not endorsed. Mr. Collins and Mr. Gay each received less than one-third of the black vote, whereas Rev. Green and Mrs. Butts each received over 87% of the black vote.

The Concerned Citizens endorsed two black candidates, Rev. John Foster and Mrs. Butts, and one white candidate, Joseph Leafe, in the 1984 election. Two black candidates who ran without the Concerned Citizens' endorsement, Theodore Hall and Joseph Rose, received 8.9% and 18.7% of the black vote, respectively. Mr. Leafe, who received only 1.7% of the black vote in 1980 when he ran without the Concerned Citizens endorsement, received 19.6% of the black vote in 1984, more than either Hall or Rose. Mrs. Butts received 72.1% of the black vote and Rev. Foster received 79.9%.

The plaintiffs have acknowledged the effectiveness of the Concerned Citizens' endorsements. In addition, the group's effectiveness is demonstrated by their success rate. From 1978 through 1984, the Concerned Citizens has endorsed twenty-one candidates both black and white, for the Norfolk City Council. Thirteen of those candidates, five black and eight white, have been elected. From 1970 to the present, the City Council has included at least two, and sometimes three, members who were endorsed by the Concerned Citizens, and who received a majority of the black vote. Six of the seven current

Council members were endorsed by the Concerned Citizens in at least one of their campaigns.[7]

### 2. The City Democratic Party

The parties agree that Norfolk's black citizens generally support Democratic candidates in partisan elections. Approximately 31% of the Norfolk City Democratic Committee members are black. Two of the Committee's six officers, the first vice-chairman and the treasurer, are black.

There have been close ties, historically, between the black members of the City Democratic Comittee and the leaders of the Concerned Citizens of Norfolk. In 1981 and 1982, however, a rift occurred in the City Democratic Committee which was related to the 1982 City Council campaign and involved several of the plaintiffs in this action.

In the fall of 1981, an election of precinct committee members was scheduled, but Party Chairman William P. Williams failed to notify Mrs. Butts, co-director of the Concerned Citizens, of the filing deadlines, as had been done customarily by past party chairmen. As a result, many persons who had previously served as precinct committee members missed the filing deadline and consequently were replaced. Approximately one-half of the precinct committee members were replaced by new precinct committee members. Herbert M. Collins, a plaintiff in this action, was among the new precinct committemen. Mrs. Butts challenged the election in a December, 1981 meeting of the Committee, charging that it should be voided for failure to provide proper notice.

In the spring of 1982, the newly constituted City Democratic Committee endorsed four of its members for City Council seats, this being the first time the Democratic Committee had

[7] The Council members and their year/s of endorsement are as follows: Dr. Mason C. Andrews (1978), Rev. John Foster (1984), Rev. Joseph N. Green, Jr. (1978, 1982), Elizabeth Howell (1974, 1978, 1980), Joseph Leafe (1984) and Claude J. Staylor, Jr. (1974).



ever endorsed City Council candidates. The Democratic ticket consisted of William P. Williams, party chairman, James F. Gay, counsel for the plaintiffs in this action, Herbert M. Collins, a plaintiff in this lawsuit, and Carolyn Papafil. Gay and Collins are black, while Papafil and Williams are white.

The Concerned Citizens endorsed Rev. Green and Mrs. Butts in the 1982 race, while plaintiff Dr. Milton Reid, publisher of the *Journal and Guide* newspaper, endorsed Collins and Gay. There was animosity between the Concerned Citizens and supporters of the Democratic ticket during the campaign. Rev. Green and Mrs. Butts each received over 87% of the black vote, while Gay and Collins each received less than one-third of the black vote.

In September, 1982, a petition was filed with the Second District Democratic Committee seeking new elections to the City Democratic Committee. An adversary hearing was eventually held before a representative of the State Democratic Party, in which James F. Gay, counsel for the plaintiffs in this action, represented the then current members of the City Committee and Delegate William R. Robinson, Jr., represented the then former Committee members. The hearing officer recommended that new elections be held.

The City Democratic Committee did not hold new elections, despite the hearing officer's recommendation. In 1983, the members of the Committee who had been displaced in 1981 organized a mass meeting of Norfolk's Democrats and elected new Committee members in an at-large election. According to Delegate Robinson, the decision to hold the mass meeting was "purely politics," without any racial connotations. (Tr. 1687).

Included amongst those precinct committee members who lost their positions at the 1983 mass meeting were plaintiffs Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham and counsel for the plaintiffs, James F. Gay. Subsequently, Mr. Gay filed a complaint with the Department of Justice, complaining about the reorganization of the City Democratic Committee. The Justice Department ultimately con-

cluded that it did not have jurisdiction of the matter under Section 5 of the Voting Rights Act.

**s. Summary**

The Court concludes that blacks have played an active role in the City's political processes, particularly through the Concerned Citizens and the City Democratic Committee. Moreover, at least one black candidate has run in every City Council election since 1964. The Court concurs with the opinions expressed by Mrs. Evelyn T. Butts, Lt. Gov. Henry E. Howell, Jr., Judge Joseph A. Jordan, Jr., Delegate William P. Robinson, Jr., and former Delegate Robert Washington, all leading politicians, that blacks have the opportunity to participate in the City's electoral processes equally with whites, and have in fact done so. All of these long-time observers of, and participants in, City politics favor retention of the at-large electoral system. The Court gives their opinions great weight.

While the defendants contend that this lawsuit is in reality a case of the "ins" versus the "outs," as a result of past confrontations between the plaintiffs and the Concerned Citizens of Norfolk over endorsements and control of the City Democratic Committee, the Court finds it unnecessary in deciding the issues in this action to enter such a thicket or to make such a finding.

**III. Conclusions Of Law**

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1973j(f).

Having already set forth the appplicable law earlier in this opinion, the Court will now consider the plaintiffs' statutory and constitutional claims.



**A. Statutory claim under Section 2 of the Voting Rights Act**

**1. The objective factors**

**a. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.**

The law is clear that the existence of past discrimination in the areas of registration, voting and political participation is significant only if it can be shown to have lingering effects on the ability of blacks to participate in the democratic process today. *See Zimmer* v. *McKeithen*, 485 F.2d at 1305-06; *see also United States* v. *Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984). The Court has found that although there is a past history of official discrimination in Virginia effecting the right of blacks to participate in the electoral process, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participting in the electoral process today. Norfolk's black citizens register to vote and turn out to vote at rates equal to or greater than that of Norfolk's white citizens when measured as a percentage of voting age population.[8] At least one black candidate has run in every Norfolk City Council election since 1964. Blacks also participate in the political process through the Concerned Citizens of Norfolk and City Democratic Party. The plaintiffs have failed to prove that the past history of official discrimination in Virginia with regard to black participation in the electoral process has left any lingering effects on the ability of Norfolk's black citizens to participate in the electoral process today.

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[8] Contrast this to the findings of the three judge court in *Gingles* v. *Edmiston*, No. 81-803-CIV-5 (E.D.N.C. January 27, 1984). In that case, the court found a substantial disparity of 14% between black and white vote. registration rates, with whites registering at the greater rate. Slip op. at 29.

**b. The extent to which voting in the elections of the state or political subdivision is racially polarized.**

The Court has adopted the definition of racial polarization offered by the defendants' expert Dr. O'Rourke as one which is supported by common sense, as well as the law. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 887 (S.D. Ala. 1982) (considering white backlash in addition to voting patterns). The Court has found few courts which have actually considered what is an appropriate definition of "racially polarized voting." Courts have, however, looked beyond the statistics offered by the parties, as this Court has done, in determining whether an electorate is racially polarized. *See, e.g., Terraza* v. *Clements*, 581 F. Supp. 1329, 1353 (N.D. Tex. 1984) (considering financing, endorsements, and incumbency). The Court concludes that under the definition of racially polarized voting which it has adopted, the Norfolk electorate is not racially polarized.

**c. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.**

**(i) Unusually large election districts**

Unusually large election districts are considered to have discriminatory effects because they may make it "more difficult for blacks to get to polling places or to campaign for office." *Rogers* v. *Lodge*, 458 U.S. 613, 627 (1982). In that case, the Supreme Court was considering an election district consisting of Burke County, Georgia, which was 831 square miles, the equivalent of two-thirds of the State of Rhode Island. *Id.* In comparison, Norfolk is only fifty-three square miles. The Court has found that Norfolk is not an unusually large election district and therefore this so-called enhancing factor does not apply.



**(ii) Majority vote requirments, anti-single-shot provisions or numbered post provisions**

A majority vote requirement may impede the ability of black candidates to win in a city in which they constitute a minority of the population. *See Gingles* v. *Edmistern*, slip. op. at 37. There is no majority vote requirement in Norfolk's electoral system.

An anti-single-shot provision may disadvantage minority voters because it "may force them to vote for nonminority candidates." *Nevett* v. *Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). There is no anti-single-shot rule governing Norfolk City Council elections.

A numbered post provision may disadvantage minority voters "by causing minority candidates to run in head-to-head contests against majority candidates." *Id.* There is no numbered post provision in Nofrolk's electoral system.

**(iii) Staggered terms**

Staggered terms are considered to be a discriminatory device because they are thought to create more head-to-head racial contests. *See City of Rome* v. *United States* 446 U.S. 156, 185 n.21 (1980); *Jones* v. *City of Lubbock*, 727 F.2d 364, 383 (1984). The Court has found, however, that this does not occur in Norfolk City Council elections because of the large field of candidates in every election.

**(iv) Lack of a district residency requirement**

The courts are divided on the issue of whether district residency requirements enhance or weaken black voting strength. *Compare Rogers* v. *Lodge*, 458 U.S. at 627 (lack of district residency requirement enhances discrimination) *with Perkins* v. *City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982) (ward residency requirement enhances discrimination), *aff'd*, 459 U.S. 801 (1982). The lack of a ward residency requirement has not been shown by the evidence to enhance the opportunity for discrimination in Norfolk City council elections.

**(v) Summary**

The Court concludes that Norfolk's electoral system is free of any devices which enhance the opportunity for discrimination against the City's black citizens.

**d. If there is a candidate slating process, whether the members of the minority group have been denied access to that process.**

*White* v. *Regester*, 412 U.S. 755, 766-67 (1973), and its progeny clarify what is meant by this factor. *See, e.g., McIntosh County Branch of the NAACP* v. *City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979). What the courts are concerned about is whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process. *See id.* The courts have considered to be relevant evidence that potential black candidates have been deterred from seeking electoral office because of fears of econommic or other forms of reprisals from the members of the white slating group. *See id.*

The Court found that there is no group of white Norfolk citizens who, acting as a formal or informal slating organization, controls access to the ballot. Moreover, the plaintiffs presented no evidence that any potential black candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community. The Court has found that the plaintiffs' contention that a white westside businessmen's coalition acted as a slating organization in the 1976 and 1980 elections is not supported by the evidence. The Court has further found that the only possible instance of slating which has occurred in Norfolk City Council elections was the City Democratic Party's support of a biracial ticket of four candidates in the 1982 election. The Court concludes that there is no candidate slating process in Norfolk and therefore Norfolk's black citizens have not been denied access to such a process.



**e. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.**

Congress explained its interpretation of this factor as follows:

> The Courts have recognized that disproportionate education[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation. . . . Where these conditions are shown, *and where the level of black participation is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207 (emphasis added); *see Major* v. *Treen*, 574 F. Supp. 325, 351 N.31 (E.D. La. 1983). In other words, if the socio-economic statistics show a disparity between black and white residents *and* the level of black political participation is less than that of whites, the plaintiffs need not show a casual nexus between the two conditions. *See United States* v. *Marengo County Commission*, 731 F.2d at 1569.

In the present case, the Court has found a disparity between Norfolk's black and white citizens based upon the socio-economic statistics in such areas as education, income, and housing conditions. The Court has found, however, that the level of black political participation in Norfolk is equal to or greater than that of the City's white citizens, as measured by voter registration and voter turnout based upon a percentage of the voting age population, two measures which the courts have used to measure minority political particiption. *See, e.g., id.* at 1568. The Court concludes that whatever socio-economic disparities exist between Norfolk's black and white residents, they do not hinder the ability of blacks to participate effectively in the City's political process today.

**f. Whether political campaigns have been characterized by overt or subtle racial appeals.**

In considering this factor, the courts have usually looked for a "general pattern of racial appeals in campaigns." *Gingles* v. *Edmisten*, slip op. at 39. In this case, the plaintiffs have alleged that only one campaign, the 1982 City Council election, was marred by racial appeals. They point primarily to the discussion of public school busing by those candidates who favored or opposed a plan by the Norfolk School Board to reduce the busing of elementary school pupils.

The Court has found that the discussion of busing during the 1982 campaign was not an appeal to racial prejudices. The issue was a matter of legitimate public concern and was raised by both black and white candidates. There was no effort by the plaintiffs to show a history or general pattern of racial appeals in Norfolk City Council elections and the Court concludes that none exists.

**g. The extent to which members of the minority group have been elected to public office in the jurisdiction.**

It is clear, as the Court pointed out earlier in this opinion, that no group has a constitutional right to proportional representation. *See Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971); *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1341 (1984). Congress explained the consideration which should be given to this factor as follows:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote" in violation of this section. *Zimmer*, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead, we shall continue to require an independent consideration of the record." *Id.*



S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.115, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

The Court has conducted an independent review of the record, and contrary to the plaintiffs' claims, has found no evidence of an attempt by Norfolk's white citizens to circumvent the Constitution by manipulating the election of a "safe" minority candidate. The Court further found that a black has been elected to the City Council in every election since 1968, and that the Council currently has two black members. In addition to black membership on the Council, white candidates who have been the choice of a majority of the black electorate have been elected to the Council consistently over the years. Moreover, the Court has found that blacks have been elected to the City's delegation to the Virginia House of Delegates and to a City constitutional office in at-large elections. The Court concludes that blacks and candidates of choice of the black community have been elected to public office in Norfolk.

**h. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.**

While the issue of responsiveness is not a necessary part of the plaintiffs' case, the plaintiffs' have chosen to offer such evidence and the defendants have accordingly offered rebuttal evidence. *See* S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.116, 1982 U.S. Code Cong. & Ad News 177, 207. The Fourth Circuit has stated that the concept of "unresponsiveness" contemplates:

> A degree of unresponsiveness to the needs and interests of the black minority so palpable that it compels—or even fairly supports—an inference that the minotiry's "voting potential" has been so effectively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body.

*Washington* v. *Finlay*, 664 F.2d 913, 923 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). In that case, the Fourth Circuit upheld the district court's finding that the city had been responsive, stating:

> Support for this ultimate finding was found in employment figures showing substantial black employment in city jobs, in significant though concededly not proportional black representation in appointive offices and supervisory positions, in the heavy allocation of federal block grant development funds to the black community, and in the substantially equal provision of essential services and improvements to black residential neighborhoods.

*Id.* at 922.

The Court concludes that the plaintiffs raised a number of issues with regard to responsiveness, but that the evidence offered by the defendants rebuts the plaintiffs' allegations of unresponsiveness. The Court has found evidence of substantial black employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black-occupied reas, and a nondiscriminatory provision of essential City services and capital improvements to black residential neighborhoods.

**i. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.**

The Court is to consider whether the City's use of the challenged election procedure "markedly departs from past practices or from practices elsewhere in the jurisdiction. . . . S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.117, *reprinted in* 1982 U.S. Code Cong. & Ad. News 207. The Court has found that Norfolk's at-large system for the election of City Council members has been in effect continuously since 1918. The Court has further found that Norfolk's at-large system of electing City Council members is consistent with the practices of an overwhelming majority of Virginia's cities, as well as with the practices nationwide of cities with council-manager forms of



government. The Court concludes that the policy underlying the use of the at-large system is not tenuous.

**2. The totality of the circumstances**

The Court has already established the proper legal standard to be applied in this case with regard to the Section 2 claim, that is, whether, based on the totality of circumstances, the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk, in that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Court has considered thoroughly the lengthy testimony and extensive documentary evidence in this case. The Court concludes, based on the totality of circumstances, that the plaintiffs have failed to prove that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the blsck citizens of Norfolk. The Court is convinced that Norfolk's black citizens have an opportunity equal to that of other members of the electorate to participate in the electoral process and to elect representatives of their choice.

**B. Statutory claim under 42 U.S.C. § 1983**

The Court concludes that the plaintiffs have failed to show that any citizen has been deprived of his or her right to vote on account of his or her race as a result of Norfolk's at-large electoral system. The plaintiffs presented no evidence that, for example, a qualified black citizen was prevented from registering to vote or from actually voting.

**C. Constitutional claims**

The Court has previously set out the appropriate legal standard to be applied in this case with regard to the constitutional claims, that is, whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of

Norfolk. Discriminatory intent need not be proved by direct evidence, but may be "inferred from the totality of the relevant facts." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Furthermore, racial discrimination "need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the fourteenth and fifteenth amendments to occur." *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984); *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

The plaintiffs presented no direct evidence that the at-large system was adopted for a discriminatory purpose. The plaintiffs urge the Court to infer from a series of newpaper articles and advertisements which appeared just days before the referendum on the charter change in 1917 that the proponents of the at-large system had racially discriminatory motives. The Court finds exactly the opposite to be true. It was the opponents of the at-large system who injected the issue of race into the public debate over the charter change just days before the referendum. Supporters of the at-large system contended that race was not an issue and that the opponents of the charter change were trying to sway voters by injecting an irrelevant issue into the public debate. The Court conludes that the plaintiffs have failed to prove, either by direct or circumstantial evidence, tht the at-large system was adopted for a racially discriminatory purpose. Likewise, the Court concludes that the at-large system has not been maintained for the purposes of discriminating against Norfolk's black citizens. In reaching these conclusions, the Court has considered all of the evidence submitted by the plaintiffs in support of their Section 2 claim.

## IV. CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, the Court holds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1983, or the United States



Constitution. Accordingly, the Clerk is DIRECTED to enter judgment in favor of the defendants, and against the plaintiffs, on all claims.

IT IS SO ORDERED.

United States District Judge

July 19, 1984
Norfolk, Virginia

# SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
83–1722 (5)
*v.*
OWEN H. BROOKS ET AL.

OWEN H. BROOKS ET AL.
83–1865 (4)
*v.*
WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM A. ALLAIN ET AL.
83–2053 (5)
*v.*
OWEN H. BROOKS ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2053. Decided November 13, 1984

The judgment is affirmed.

JUSTICE STEVENS, concurring.

Although I agree that a summary affirmance of the judgment of the District Court is entirely appropriate in this case, what has been written in dissent prompts me to make two important points.

First, there is little, if any, resemblance between the argument advanced in the dissenting opinion and the specific questions presented in the parties' jurisdictional statements. This Court has determined that summary affirmances "reject the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). The only questions presented in the jurisdictional statement that the Mississippi Republican Executive Committee filed in case No. 83–1722 read as follows:

"1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.

"2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.

"3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.

"4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Juris. Statement i.[1]

Second, the dissent does not fairly characterize the opinion of the District Court. That opinion does not "in effect" construe the recent amendment to § 2 of the Voting Rights Act as entitling "minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State redistricting plan invalidated if it has failed to provide at least one district in which the 'minority' is a majority of the eligible voters." *Post*, at 1. The dissent buttresses this incorrect impression by attributing the following statement to the District Court:

"The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would

[1] The Jurisdictional Statement that William A. Allain and others filed in No. 83–2053 presents two questions that are similar to those presented in No. 83–1722 and also presents the question whether the District Court erroneously found as a fact that black persons in Mississippi—and especially in the Delta generally—have less education, lower incomes, and more menial occupations than white persons, and that there has been racially polarized voting in Mississippi. See n. 2, *infra*. Nothing in the dissenting opinion indicates that it believes these questions merit full briefing and argument. In my judgment the jurisdictional statement in No. 83–1865 raises a more serious question, but I do not understand that the dissenting opinion favors review of that question.



have a 'clear black voting age population majority of 52.83 percent.'" *Post*, at 4.

What the District Court actually said was this:

"In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." App. to Motion to Dismiss or Affirm of Owen H. Brooks 14a.

The District Court's conclusion that its remedy was required was not based on any notion that the law gives every minority group an entitlement to some form of proportional representation. Its conclusion was quite the contrary. It rested on specific findings of fact describing the impairment—or "dilution" if you will—of the voting strength of the black minority in Mississippi. Those factual findings reveal that Mississippi has a long history of de jure and de facto race discrimination,[2] that racial bloc voting is common in Missis-

[2] Regarding past discrimination, the District Court carefully found that Mississippi had often used poll taxes, literacy tests, residency requirements, white primaries and violence to intimidate black persons from registering to vote. More importantly, the court found "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." App. of Motion to Dismiss or Affirm of Owen H. Brooks 9a. Additionally, the court wrote:

"Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

"The evidence of socio-economic disparites between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in the Delta region, generally have less education, lower in-

sippi, and that political processes have not been equally open to blacks.[3]

Because I find no merit in any of the specific challenges presented in the parties' jurisdictional statements,[4] and because the record supports the District Court's findings of fact, as the dissent notes, *post*, at 10, I join the Court's summary affirmance.

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comes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. . . . Census statistics indicate lingering effects of past discrimination: the median family income in the Delta region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing." *Id.*, at 9a–10a (footnote omitted).

[3] The court also found that there existed "persuasive evidence" the Mississippi's political processes have not recently been open to black persons. In addition, the court particularly noted the following messsage accompanying a campaign television commercial:

"You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations." App. of Motion to Dismiss or Affirm of Owen H. Brooks 12a, n. 8.

The commercial opened and closed with a view of Confederate monuments; the candidate that ran the commercial used "He's one of us" as his campaign slogan. *Ibid.*

[4] Indeed, it should be noted that the District Court's plan would be an acceptable remedy for the violations even if it did not regard the Simpson plan itself as a violation of § 2 of the Voting Rights Act as amended. For after our remand, the District Court could have appropriately decided that the policy of that Act, coupled with the findings of fact concerning the effects of historic discrimination, particularly in the Delta area, required a remedy that established at least one district in which black persons represented an effective majority of the eligible voters.

# SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2053. Decided November 13, 1984

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The District Court's ruling in this case presents important questions concerning the construction of the recent amendment to §2 of the Voting Rights Act of 1965, 42 U. S. C. §1973 (1982). The District Court in effect has construed the amendment to entitle minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State re-districting plan invalidated if it fails to provide at least one district in which the "minority" is a majority of the eligible voters. This is so even though the challenged re-districting plan is constitutional, is not the product of discriminatory intent, and indeed was intended by the court which adopted it to "deal fairly with [the State's] black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength."

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In 1982, the District Court in this case adopted a re-districting plan for Mississippi's congressional districts in order to remedy district population disparities, revealed by the 1980 census, of up to 17%. In choosing from among several plans offered by the litigants, it sought a plan that would "satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Jordan* v. *Winter*, 541 F. Supp. 1135, 1142 (ND Miss. 1982) *(Jordan I)*. The court further observed that "[w]hat is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength." *Id.*, at 1143. The court chose the so-called "Simpson" plan because it satisfied most of the state's policy considerations in districting, created two districts with 40% or better black population, and included a district where nearly 54% of the population was black.

On appeal to this Court, the judgment of the District Court was vacated and the case remanded for reconsideration in the light of the 1982 amendments to the Votings Rights Act. *Brooks* v. *Winter*, —— U. S. ——, 103 S. Ct. 2077 (1983). On remand, the District Court found that the very plan which it had approved and adopted in 1982 was unlawful under the amended §2 of the Voting Rights Act because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." *Jordan* v. *Winter*, No. GC82–80–WK–0 (ND Miss., April 16, 1984) *(Jordan II)*. I think the rather remarkable conclusion that the 1982 amendments to the Voting Rights Act made unlawful a plan adopted by the District Court, which plan the District Court had adopted with a view to the requirement that "the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength," should receive plenary review by this Court.

After being presented with the census data revealing the previously mentioned population disparities between existing



congressional districts, the Mississippi Legislature in 1981 enacted a new re-districting plan. The Attorney General of the United States refused pre-clearance, however, and the Legislature adjourned without enacting a new plan. A three-judge District Court was convened to hear actions filed by two groups of Mississippi voters seeking a court-ordered interim plan for the 1982 congressional elections. That court refused to place in effect the legislative plan which had not been pre-cleared, and held the exiting districting statute unconstitutional because of the population disparities. It then adopted the "Simpson" plan from among several plans submitted to it by the litigants. *Jordan I*, *supra*.

In choosing the Simpson plan, the court followed the teaching of *Upham* v. *Seamon*, 456 U. S. 37 (1982), which requires courts to fashion interim plans that adhere to a State's political policies. The court identified Mississippi's political districting policies as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. The court specifically rejected two plans proposed by a group of black plaintiffs. These plans would have kept the predominantly black Northwest or "Delta" portion of Mississippi intact, and would have combined that area with predominantly black portions of Hinds County and the City of Jackson. Each of these plans would have resulted in one congressional district with a black population of approximately 65%. The Simpson plan, on the other hand, combined 15 Delta or partially Delta counties with six predominantly white eastern rural counties, and resulted in a congressional district with a 53% black population, but a 48% black voting population. The District Court found the Simpson Plan most nearly in accord with the State's policies articulated above. The rejected plans would have resulted in only one district with greater than 40% black population; this was contrary to the reasonable state policy established to

assure that blacks would have an effective voice in choosing representatives in more than one district. In addition, the court noted that the black plaintiffs had managed to place a high percentage of black voters in a single congressional district only through obvious and unseemly racial gerrymanders.

When this Court subsequently vacated the District Court's judgment for reconsideration in the light of the 1982 amendment the District Court held further evidentiary hearings, and concluded that its own plan violated the amended section. This violation occured, in the opinion of the District Court, because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." Under the plan adopted by the District Court in 1982, the Second District had a black population of 53.77%, but blacks comprised only 48.05% of the voting age population. The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a "clear black voting age population majority of 52.83 percent." In doing so, the District Court "recognize[d] that the creation of a Delta District with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." *Jordan II*, *supra*.

Any statute that would lead a District Court to reject a plan which it had previously found fair to all concerned in favor of one including an obligatory district with a majority black voting age population deserves careful attention, and so I turn to the language of the Voting Rights Act as amended in 1982. The District Court in its most recent opinion set out the statutory provisions toward the beginning of its opinion, but scarcely mentioned that language again, and instead went on to quote extensively from the Senate Report of the 1982 amendments. The applicable statutory language is this:



"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in § 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U. S. C. § 1973 (emphasis in original).

Applying the statutory language to the situation confronting the District Court after our remand, the "voting qualification or prerequisite to voting or standard, practice, or procedure" to which the amended statute is to be applied is obviously the 1982 plan adopted by the District Court. That court clearly thought so, and no other "qualification . . . standard, practice, or procedure" suggests itself. There has never been any suggestion that the plan adopted by the District Court in 1982 denied or abridged the right of any citizen to vote on account of race or color, so if that plan does violate the amended act it is because it contravenes "the guarantees set forth . . . in subsection (b).

Subsection (b), in turn, provides that a violation of subsection (a) is established if "[i]t is shown that the political

processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." The District Court read subsection (b) as if it were totally divorced from subsection (a), and proceeded to enumerate factors in the political history of Mississippi which it felt indicated that the plan it had adopted in 1982 "unlawfully dilutes minority voting strength." *Jordan II*, *supra*. The District Court did not state what it understood the term "unlawfully dilutes minority voting strength" to mean, and since that term is nowhere used in the statutory language one is left to infer that the court derived the necessary meaning for the language from the report of the Senate Judiciary Committee which it cited at some length. The District Court's understanding of what is required by § 2 is highly questionable in light of the statute's language and legislative history. To fully evaluate the District Court's analysis it is necessary to review the events preceding the amendment of § 2.[1]

In *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court wrestled with the question whether legislative "intent" to discriminate must exist in order to find that a particular legislative action violates the Voting Rights Act, or whether it was enough that the legislative action have a "discriminatory effect." In *City of Mobile* black plaintiffs had brought an action challenging the constitutionality of the city's at-large method of electing its commissioners. We produced six different opinions debating among ourselves whether discriminatory intent was required to find a violation of the Fifteenth Amendment, or whether "an invidious discriminatory purpose could be inferred from the totality of facts." *Id.*, at 95 (WHITE, J., dissenting). None of the opinions challenged the conculsion of the plurality that the Voting Rights Act as it then existed added, "nothing to appellee's Fifteenth Amendment claim." *Id.*, at 61 (Opinion of Stewart, J.).

[1] JUSTICE STEVENS' concurrence suggests that my analysis is unwarranted because the problems I perceive with the District Court's opinion were not specifically raised by the "questions presented" in appellants' jurisdictional statements. I believe, however, that several of the "questions presented" "fairly include" the issues that I address. In particular, question 3, cited *supra*, at —— (STEVENS, J., concurring), raises the question of the scope of activity Congress intended to proscribe under § 2. I need not agree 100% with appellants' position—that § 2 only proscribes intentionally discriminatory conduct—to reach the question whether the District Court misconstrued Congress' intent.



It is clear that the 1982 amendment was precipitated in large part by the holding of *City of Mobile*. But the language used in the amended statute is, to say the least, rather unclear. The legislative history indicates that Congress was well aware of the "intent"—"effects" dichotomy, and of the problems with identifying actions with discriminatory "effects." The bill originally passed the House under a loose understanding that § 2 would prohibit all discriminatory "effects" of voting practices, and that intent would be "irrelevant." H. R. Rep. No. 97–227, p. 29. This version met stiff resistance in the Senate, however. Two Senate subcommittees held extensive hearings, at which testimony was given concerning the tendency of a "results" approach to lead to requirements that minorities have proportional representation, or to devolve into essentially standardless and ad hoc judgments. See, *e. g.*, Hearings on S. 53 et al. before the Senate Subcommittee on the Judiciary, 97th Cong., 2d Sess., 1309–1313, 1334–1338 (1982). The subcommittees could not agree on the proposed amendment, and at that point Senator Dole stepped in with a proposed compromise. The compromise bill retained the "results" language but also incorporated language directly from this Court's opinion in *White* v. *Regester*, 412 U. S. 755 (1973), and strengthened the caveat against proportional representation. The debates on the compromise focused on whether the "results" language would nevertheless provide for proportional representation, or merely for equal "access" to the political process. Senator Dole took the position that "access" only was required by amended § 2: "[T]he concept of identifiable groups having a right to be

elected in proportion to their voting potential is repugnant to the democratic principles on which our society is based." See 128 Cong. Rec. S6961 (1982) (remarks of Senator Dole). This position was adopted by many supporters of the compromise in the Senate, and the bill passed as written.

The District Court apparently felt obliged to reach a conclusion in tension with this legislative history because of language in the Senate Judiciary Committee Report on the 1982 amendment stating that the "results" language of § 2(a) was meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." S. Rep. No. 97–417, p. 27 (1982). The Report then enumerates the factors courts may consider in deciding whether plaintiffs have established a violation of § 2, factors apparently derived from this Court's opinion in *White* v. *Regester*, *supra*.[2] Applying these "factors," the District Court found that Mississippi has

[2] Those factors are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 97–417, *supra*, pp. 28–29.



a long history of *de jure* and *de facto* race discrimination, which has present effects in impeding black voter registration and turnout. It noted that although blacks constitute 35 percent of the state's population, no black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Furthermore, the court found socioeconomic disparities between blacks and whites in the Delta area, and finally, that voters in Mississippi have previously voted and continued to vote on the basis of the race of candidates for elective office. The District Court concluded from this that the adoption of a plan in which the Second District contained less than a majority of voters from a protected class "diluted" the class' voting strength.

Thus we have a statute whose meaning is by no means easy to determine, supplemented by legislative history which led the District Court in this case to conclude that only the inclusion within one congressional district of a majority black voting age population could satisfy the Act. I think it can be fairly argued from the legislative history, and from the express caveat that the section was not intended to establish a right to proportional representation, that in amending § 2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class.

To best understand the meaning of the Senate Committee's references to our decisions in *City of Mobile* and *White* v. *Regester*, it is essential to remember that those cases dealt with challenges to *multi-member legislative districts*. It is only in this context that phrases such as "vote dilution" make any sense, for the phrase itself suggests a norm with respect to which the fact of dilution may be ascertained. In the case of multi-member districts, the norm available for at least theoretical purposes is the single-member district. But when we turn from attacks on multi-member districts to attacks on the way lines are drawn in creating five single-member con-

gressional districts, as in the case at hand, phrases such as "vote dilution" and factors relied upon to determine discriminatory effect are all but useless as analytical tools. Neither *White* v. *Regester*, *supra*, *City of Mobile* v. *Bolden*, *supra*, nor *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), a case also dealing with challenges to multi-member legislative districts, ever suggested that their analysis should be carried over to challenges addressed to single member districts. And whichever of the views espoused in *City of Mobile* is found to have been adopted by the 1982 amendment, it would seem that a plan adopted by the District Court under the command "that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength" should be home free under either test.

Under this view, the District Court's most recent opinion and judgment seems to me to present virtually insuperable difficulties. Although we may regretfully concede that the District Court's findings were correct, it nevertheless seems a non sequitur to say that the past discrimination, and its present effects, have "resulted" in "dilution" of minority voting strength *through the adoption of this particular districting plan*. To the extent that less blacks vote due to past discrimination, that in itself diminishes minority voting strength. But this occurs regardless of any particular state voting practice or procedure. As the plurality opinion in *City of Mobile* recognized in another context, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile*, 446 U. S., at 74. Here the only finding even remotely related to the boundaries of the Second Congressional District under the 1982 plan is what the District Court referred to as "socioeconomic disparities between blacks and whites in the Delta area." The findings as to the history of racial discrimination and bloc voting apparently obtained throughout the State. It is obvious that no plan adopted by



the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. What we have, therefore, is in effect a declaration by the District Court that because of these past examples of racial discrimination throughout the State, any plan adopted by either the legislature or by a court which did not give blacks one of five congressional districts in which they had a majority of the voting age population violated the 1982 amendments to the Voting Rights Act. Under this analysis, cause and effect are entirely severed.

For these reasons, I think the judgment of the District Court presents substantial questions concerning the interpretation of a new amendment to the Voting Rights Act of 1965, and that the Court seriously misapprehends its obligation in such a case when it summarily affirms the judgment of the District Court.